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Sup. Ct.

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1946

No. 76

Sep No. 55

THE ALLEGHENY LUDLUM STEEL CORPORATION, APPELLANT,

vs.

WILLIAM J. KELLEY AND H. MYRON LEWIS, CONSTITUTING THE STATE LABOR RELATIONS BOARD OF THE STATE OF NEW YORK

APPEAL FROM THE SUPREME COURT OF THE STATE OF NEW YORK, COUNTY OF CHAUTAUQUA

FILED APRIL 3, 1946.

SUPREME COURT OF THE UNITED STATES

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WILLIAM J. KELLEY AND H. MYRON LEWIS, CONSTITUTING THE STATE LABOR RELATIONS BOARD OF THE STATE OF NEW YORK

APPEAL FROM THE SUPREME COURT OF THE STATE OF NEW YORK, COUNTY OF CHAUTAUQUA

INDEX

	Original	Print
Record from Supreme Court of New York, County of Chautauqua	1	1
Notice of appeal to the Appellate Division	1	1
Judgment of the Supreme Court, Chautauqua County, entered October 3, 1944	3	2
Order of the Supreme Court, Chautauqua County, filed October 3, 1944	6	5
Summons	10	7
Complaint	11	8
Amended answer	20	14
Decision and direction of election of State Labor Relations Board	27	20
Notice of motion for judgment	42	40
Affidavit of H. Myron Lewis, in support of motion	44	41
Affidavit of Ernest E. Cavagnaro, in support of motion	50	46
Affidavit of Stanley A. McCaskey, in opposition to motion	52	47

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—5680

	Original	Print
Record from Supreme Court of New York, County of Chautauqua—Continued		
Reply affidavit of H. Myron Lewis, in support of motion	59	53
Stipulation as to number of appellant's employees certification of collective bargaining representative of employees, other than foremen, etc.	65a	58
Opinion of the Supreme Court, Chautauqua County, Hinkley, J.	66	59
Notice of appeal to the Court of Appeals	72	63
Judgment after affirmance by the Appellate Division	74	64
Order of affirmance by the Appellate Division	76	65
Remittitur of the Court of Appeals	77a	67
Order on remittitur of Court of Appeals, Dated December 26, 1945	78	68
Judgment on remittitur of Court of Appeals, entered December 28, 1945	80	69
Petition for appeal to the Supreme Court of the United States	82	71
Assignment of errors and prayer for reversal	86	74
Order allowing appeal	112	76
Citation and service (omitted in printing)	114	
Stipulation indicating portions of record to be included in transcript	116	77
Clerk's certificate (omitted in printing)	118	
Statement of points to be relied upon and designation of record	120	79
Order noting probable jurisdiction	121	79

[fol. 1]

IN SUPREME COURT OF NEW YORK, COUNTY OF CHAUTAUQUA

THE ALLEGHENY LUDLUM STEEL CORPORATION, Plaintiff,

against

WILLIAM J. KELLEY and H. MYRON LEWIS, Constituting the State Labor Relations Board of the State of New York, Defendants.

NOTICE OF APPEAL—Filed October 28, 1944

SIR:

Please Take Notice that The Allegheny Ludlum Steel Corporation, hereby appears to the Appellate Division of the Supreme Court for the Fourth Department from an order made in the above entitled action at a Special Term of this Court held in and for the County of Chautauqua on the 26th day of September, 1944, and entered in the Chautauqua County Clerk's office on the 3rd day of October, 1944, dismissing the complaint herein upon the merits and not as a matter of discretion, and from each and every part of said order.

Please Take Further Notice that the plaintiff, The Allegheny Ludlum Steel Corporation, hereby appeals to the Appellate Division of the Supreme Court for the Fourth Department from the judgment entered herein in the office of the Clerk of Chautauqua County on the 3rd day of October, 1944 wherein it was adjudged that the complaint herein be dismissed on the merits and not as a matter of discretion.

Dated: Buffalo, N. Y., October 27, 1944.

Yours etc., Moot, Sprague, Marcy & Gulick, Attorneys for Appellant, Office and P. O. Address, 302 Erie County Bank Bldg., Buffalo 2, N. Y.

To: William E. Grady, Jr., Esq., Attorney for Respondent, Office and P. O. Address, 250 W. 57th St., New York, N. Y.

[fol. 2] IN SUPREME COURT OF NEW YORK, COUNTY OF CHAUTAUQUA

[Title omitted]

NOTICE OF SETTLEMENT

SIRS:

Please Take Notice that a judgment of which the within is a true copy will be presented for settlement and signature to Mr. Justice Hinkley at a Special Term of this Court for the County of Chautauqua, at the County Courthouse in Erie County in the City of Buffalo, State of New York, on the 14th day of August, 1944, at 10:00 o'clock in the forenoon.

Dated, New York, N. Y., August 7, 1944.

Yours, etc., William E. Grady, Jr., Attorney for Defendants, Office and Post Office Address, 250 West 57th Street, Borough of Manhattan, City of New York.

To: Moot, Sprague, Marcy & Gulick, Esqs., Attorneys for Plaintiff, Office and Post Office Address, 302 Erie County Savings Bank Building, Buffalo 2, New York.

[fol. 3] IN SUPREME COURT OF NEW YORK, COUNTY OF CHAUTAUQUA

At a Special Term of the Supreme Court of the State of New York held for the County of Chautauqua at the County Courthouse in Erie County in the City of Buffalo, New York, on the 26 day of Sept. 1944 R.

Present: Honorable Alonzo G. Hinkley, Justice.

THE ALLEGHENY LUDLUM STEEL CORPORATION, Dunkirk, N. Y., Plaintiff,

against

WILLIAM J. KELLEY and H. MYRON LEWIS, Constituting the State Labor Relations Board of the State of New York, of 250 W. 57th St., New York City, Defendants

JUDGMENT— Entered October 3, 1944

An order having been made on Sept. 26, 1944, at a Special Term of this Court held for the County of Chautauqua at

the County Courthouse in Erie County in the City of Buffalo, New York, granting defendants' motion for judgment on the pleadings under Rule 112 of the Rules of Civil Practice and granting defendants' motion for summary judgment under Rule 113 of the Rules of Civil Practice, and directing that defendants have judgment dismissing the complaint herein on the merits and not as a matter of discretion, and said order having been duly entered in the Chautauqua County Clerk's office on Oct. 3, 1944.

Now, on motion of William E. Grady, Jr., Attorney for the defendants, it is

Adjudged and Decreed, that the defendants do hereby have judgment dismissing the complaint on the merits and not as a matter of discretion and that the complaint herein be, and hereby is dismissed on the merits and not as a matter of discretion.

Enter in County of Chautauqua.

Alonzo G. Hinkley, Justice of the Supreme Court.

[fol. 4] AFFIDAVIT OF SERVICE BY MAIL

STATE OF NEW YORK,
City of New York,
County of New York, ss:

Bert Radeloff, being duly sworn, deposes and says that she is a secretary in the office of William E. Grady, Jr., the attorney for the above named defendants herein. That on the 7th day of August 1944, she served the within Proposed Judgment with Notice of Settlement upon Moot, Sprague, Marcy & Gulick, Esqs., the attorneys for the within named plaintiff by depositing a true copy of the same securely enclosed in a post-paid wrapper in a Post-Office Box regularly maintained by the United States Government at 250 West 57th Street, in said County of New York, directed to said attorneys for the plaintiff at No. 302 Erie County Savings Bank Building, Buffalo 2, N. Y., that being the address within the State designated by them for that purpose upon the preceding papers in this action as the place where they then kept an office, between which places

there then was and now is a regular communication by mail.

Deponent is over the age of 21 years.

Bert Radeloff.

Sworn to before me this 7th day of August, 1944.
William J. Peterson, Notary Public, Queens Co.
No. 1627.

[fol. 5] In Supreme Court of New York, County of Chautauqua

[Title omitted]

Notice of Settlement

Sirs:

Please Take Notice that an order of which the within is a true copy will be presented for settlement and signature to Mr. Justice Hinkley at a Special Term of this Court for the County of Chautauqua, at the County Courthouse in Erie County in the City of Buffalo, State of New York, on the 14th day of August, 1944, at 10:00 o'clock in the forenoon.

Dated, New York, N. Y., August 7, 1944.

Yours, etc., William E. Grady, Jr., Attorney for Defendants, Office and Post Office Address, 250 West 57th Street, New York, N. Y.

To: Moot, Sprague, Marcy & Gulick, Esqs., Attorneys for Plaintiff, Office and Post Office Address, 302 Erie County Savings Bank Building, Buffalo 2, New York.

[fol. 6] IN SUPREME COURT OF NEW YORK, COUNTY OF CHAUTAUQUA

At a Special Term of the Supreme Court of the State of New York, held for the County of Chautauqua at the County Courthouse in Erie County in the City of Buffalo, New York, on the 26 day of Sept. 1944.

Present: Honorable Alonzo G. Hinkley, Justice.

THE ALLEGHENY LUDLUM STEEL CORPORATION, Dunkirk, N. Y., Plaintiff,

against

WILLIAM J. KELLEY and H. MYRON LEWIS, Constituting the State Labor Relations Board of the State of New York, 250 W. 57 St. N. Y. City, Defendants

ORDER—Filed October 3, 1944

The defendants above named having duly moved under Rule 112 of the Rules of Civil Practice for an order for judgment on the pleadings dismissing the complaint herein, and under Rule 113 of the Rules of Civil Practice for an order dismissing the complaint herein and directing that judgment be entered in favor of defendants herein upon the ground that the action has no merit, and said motions having duly and regularly come on to be heard,

Now, on reading and filing the complaint and amended answer herein and the notice of motion dated the 2nd day of June, 1944, with proof of due service thereof, in support of the motion under Rule 112 of the Rules of Civil Practice, and on reading and filing the said complaint and amended answer herein, the said notice of motion dated the 2nd day of June, 1944, with proof of due service thereof, the affidavits of H. Myron Lewis, sworn to the 31st day of May, 1944 and the 19th day of July, 1944 respectively, and the exhibit thereto annexed, and the affidavit of Ernest E. Cavagnaro sworn to the 31st day of May, 1944, in support of the *the* motion under Rule 113 of the Rules of Civil Practice, and the affidavit of Stanley A. McCaskey, Jr., sworn [fol. 7] to the 27th day of June, 1944, in opposition to said motion under Rule 113, and after hearing Daniel Kornblum, Esq., attorney for defendants, by William E. Grady, Jr., Esq., of counsel in support of said motions, and Moot, Sprague, Marcy & Gulick, Esqs., attorneys for plaintiff, by

Welles V. Moot, Esq., of counsel in opposition thereto, and all facts having been duly stipulated and due deliberation having been had, and upon the filing of the opinion of this Court, now, on motion of William E. Grady, Jr., Esq., attorney for defendants, and he having objected to findings of fact and conclusions of Law, it is

Ordered, that the said motions be, and the same hereby are, granted in all respects, and it is further

Ordered, that the complaint in this action be, and the same hereby is, dismissed upon the merits and not as a matter of discretion, and that judgment be entered herein in favor of the defendants and against the plaintiff dismissing the said complaint upon the merits and not as a matter of discretion.

Enter in County of Chautauqua.

Alonzo G. Hinkley, Justice of the Supreme Court.

[fol. 8] AFFIDAVIT OF SERVICE BY MAIL

STATE OF NEW YORK,
City of New York,
County of New York, ss:

Bert Radeloff, being duly sworn, deposes and says that she is a secretary in the office of William E. Grady, Jr., the attorney for the above named defendants herein. That on the 7th day of August, 1944, she served the within Proposed Order with Notice of Settlement upon Moot, Sprague, Marcy & Gulick, Esqs., the attorneys for the within named plaintiff by depositing a true copy of the same securely enclosed in a post-paid wrapper in a Post-Office Box regularly maintained by the United States Government at 250 West 57th Street, in said County of New York, directed to said attorneys for the plaintiff, at No. 302 Erie County Savings Bank Building, Buffalo 2, N. Y., that being the address within the State designated by them for that purpose upon the preceding papers in this action as the place where they then kept an office, between which places there then was and now is a regular communication by mail.

Deponent is over the age of 21 years.

Bert Radeloff.

Sworn to before me this 7th day of August, 1944.
William J. Peterson, Notary Public, Queens Co., No. 1627.

[fol. 9] IN SUPREME COURT OF NEW YORK, COUNTY OF CHAUTAUQUA

[Title omitted]

STATE OF NEW YORK,
County of New York,
City of New York, ss:

David A. Sterling, being duly sworn, deposes and says: that he is over the age of twenty-one years and resides in the City of New York.

That on the 14th day of April, 1944, at No. 250 West 57th Street, New York City, New York he served the summons and complaint in this action upon William J. Kelley and Myron Lewis, constituting the State Labor Relations Board of the State of New York, the defendants in this action by delivering a true copy of said summons and complaint to each of said defendants personally and leaving the same with them. He further says that he knew the persons so served as aforesaid to be the same persons mentioned and described in the said summons and complaint as the defendants in this action.

David A. Sterling.

Sworn to before me this 14th day of April, 1944. Jacob R. Silvermintz, Notary Public Kings Co., No. 1125, Reg. No. 445-S-5. Cert. filed in N. Y. Co., No. 1039, Reg. No. 598-S-5. Commission expires March 30, 1945.

[fol. 10] IN SUPREME COURT OF NEW YORK, COUNTY OF CHAUTAUQUA

[Title omitted]

SUMMONS

To the above-named Defendant:

You are hereby summoned to answer the Complaint in this action, and to serve a copy of your answer, or, if the complaint is not served with this summons to serve a notice of appearance, on the Plaintiff's Attorneys, within twenty days after the service of this Summons, exclusive of the

day of service. In case of your failure to appear or answer, judgment will be taken against you by default for the relief demanded in the complaint.

Trial to be held in the County of Erie.

Dated this 10th day of April, 1944.

Moot, Sprague, Marcy & Gulick, Attorneys for Plaintiff, Office and P. O. Address, 302 Erie County, Savings Bank Bldg., Buffalo, N. Y.

[fol. 11] In Supreme Court of New York, County of Chautauqua

The Allegheny Ludlum Steel Corporation, Plaintiff,

against

William J. Kelley and Myron Lewis, Constituting the State Labor Relations Board of the State of New York, Defendants

Complaint—Filed October 3, 1944

Plaintiff, by Moot, Sprague, Marcy & Gulick, its attorneys, for its complaint herein alleges:

1. That it is a corporation duly incorporated under the laws of the Commonwealth of Pennsylvania and having its principal place of business in Allegheny County, Pennsylvania, and that it is duly registered pursuant to the Laws of the State of New York to do business therein.

2. That plaintiff owns a steel mill and leases from Defense Plant Corporation a second steel mill in the City of Dunkirk, Chautauqua County, New York, and that plaintiff operates the said mills hereinafter referred to as plaintiff's plant. That plaintiff has its principal place of business within the State of New York at the said City of Dunkirk, in Chautauqua County, New York.

3. Upon information and belief that the defendants, William J. Kelley and Myron Lewis, constitute the State Labor Relations Board of the State of New York, having been duly appointed pursuant to the provisions of Article 20 of the Labor Law of the State of New York and are charged with various duties by Article 20 of the said Labor Law.

[fol. 12] 4. That among these duties is that of making investigations and determining appropriate units of employees for collective bargaining, holding elections for such employees to enable the said employee units to designate representatives for the purpose of collective bargaining and thereafter certifying duly elected representatives as exclusive representatives of employees in the unit for the purpose of collective bargaining in respect to rates of pay, wages, hours of employment and other conditions of employment, but that these duties may be undertaken by the said Board only insofar as their action in connection therewith would not conflict with the action, jurisdiction or policy of the National Labor Relations Board as prescribed by the National Labor Relations Act.

5. Upon information and belief that the Foremen's Association of America, Allegheny Ludlum Steel Corporation Chapter No. 58, is a labor union and, upon information and belief, that its membership is limited to supervisory employees whose work consists solely of supervising other employees of the plaintiff hired in connection with the operation of plaintiff's said Dunkirk plant.

6. Upon information and belief that heretofore and on or about the 2nd day of January 1944, the said Union filed its petition with the said Labor Relations Board in writing, alleging that a question or controversy had arisen concerning the representation of supervisory employees of the plaintiff and said petition requested that the said Board investigate such question or controversy and certify said Union as the appropriate representative for collective bargaining by such supervisory employees of plaintiff at its said plant.

7. That acting upon said petition the defendants have conducted various hearings for the purpose of investigating [fol. 13] questions raised by said petition and have subpoenaed certain of the records of the plaintiff and taken evidence and heard testimony with regard to issues purportedly raised by said petition.

8. That plaintiff has duly moved that said petition be dismissed upon the ground that the Labor Relations Board of the State of New York has no jurisdiction in the premises and because said Union is not an appropriate collective bargaining unit.

9. That defendants have refused to agree with the plaintiff that plaintiff's employees at its said Dunkirk plant are subject to and protected by the provisions of the National Labor Relations Act, and that the defendants continue wrongfully to assert jurisdiction of the matters covered by the said petition.

10. That approximately 95% in value of the products shipped from said Dunkirk plant are shipped to points outside the State of New York and 86% in value of raw materials purchased for use in the said plant are received from outside the State of New York and of materials partially fabricated at other plants of the corporation and shipped to said Dunkirk plant for further fabrication over 85% in value are shipped to said Dunkirk plant from outside the State of New York and the Allegheny Ludlum Steel Corporation in operating its said plant in the City of Dunkirk is engaged in interstate commerce.

11. That the Congress of the United States has heretofore enacted the National Labor Relations Act (U. S. Code, Title 29, Chap. 27; 29 U. S. C. A. 151 ff.) and that said Act has been duly signed by the President of the United States and has at all times herein mentioned been in full force and effect.

12. That pursuant to said National Labor Relations Act the United States Government has assumed jurisdiction of [fol. 14] labor disputes which may affect interstate commerce and Congress has delegated to the National Labor Relations Board, appointed pursuant to the provisions of said Act, certain duties and powers in connection with the regulation of employer-employee relationships which may affect interstate commerce.

13. That pursuant to said National Labor Relations Act the National Labor Relations Board has the sole power to determine appropriate bargaining units among the employees of the plaintiff at its said Dunkirk plant whether said employees are or are not employed in a supervisory capacity.

14. That it is the settled policy of the National Labor Relations Board to refuse to certify a union of supervisory employees of such a character as the Foremen's Association of America, Allegheny Ludlum Steel Corporation

Chapter No. 58, as a bargaining agent because the said National Labor Relations Board does not regard a bargaining unit consisting solely of supervisory employees whose only work is to supervise other employees as an appropriate bargaining unit and that except under exceptional circumstances which do not obtain in the premises certification of all unions of supervisory employees has been refused by the said National Labor Relations Board.

15. That said National Labor Relations Board has in a certain case entitled "Matter of Allegheny Ludlum Steel Corporation and Steel Workers Organizing Committee, Case No. III-R-411" exercised jurisdiction over plaintiff and over certain of the employees of said Dunkirk mills of the plaintiff and certified a collective bargaining representative for said employees, which certification is still in full force and effect.

16. That by virtue of the Acts of Congress and the acts and decisions of the National Labor Relations Board, [fol. 15] Congress and the National Labor Relations Board have assumed jurisdiction over the entire field of controversies within which the present controversy falls.

17. That as to all such matters the jurisdiction of the National Labor Relations Board of the United States Government is exclusive and that the Labor Relations Board of the State of New York has no jurisdiction to entertain the said petition or to make any determination of the questions and issues raised and presented by the said petition and presently before the State Labor Relations Board.

18. That the provisions of the Laws of the State of New York, and particularly of Article 20 of the Labor Law of the State of New York, do not confer jurisdiction of said questions, issues and other matters covered by the said petition upon the Labor Relations Board of the State of New York.

19. That by reason of the threatened continuance of said proceedings before the New York State Labor Relations Board, plaintiff is threatened with the issuance of an order by the said defendants constituting said Board, pursuant to which order an election to determine a bargaining unit for the said supervisory employees of the plaintiff will be held, and the holding of such an election and the

issuance of such order will cause irreparable harm and damage to the plaintiff. Such action of the defendants destroys the harmonious relations between plaintiff and its supervisory employees, defeats the purpose of the Act by causing instead of preventing labor disputes and places plaintiff in a position of being ordered to perform actions and to conduct itself in relation to its supervisory employees in a manner directly in conflict with the declared policy of the National Labor Relations Board all of which impairs the war effort.

[fol. 16] 20. That by reason of the foregoing the plaintiff is threatened with substantial and irreparable injury because no review of the threatened actions of the State Labor Relations Board can be had in the courts pursuant to the Labor Law until after an election has been held as aforesaid and plaintiff has refused to recognize the bargaining agent certified by the State Labor Board and said Board has thereafter made a final order adjudging plaintiff to have committed an unfair labor practice and because it may hereafter be subjected to conflicting rulings of the State Labor Relations Board and the National Labor Relations Board as regards its relations with its said supervisory employees and with the said Union and may be directed by the New York State Labor Relations Board to do that which is illegal under the National Labor Relations Act and the rulings of the National Labor Relations Board.

21. The plaintiff further is advised and believes that the actions of the New York State Labor Relations Board in the premises and the provisions of the New York State Labor Relations Act, insofar as the same may apply to plaintiff and its relation to its supervisory employees, are void because in violation of the provisions of the Constitution of the United States, since that Act as the said State Board threatens to apply it in this instance denies due process of law and violates Article I, Section 8, giving the Federal Government control of interstate commerce.

22. That plaintiff has no adequate remedy at law.

23. That plaintiff, in view of the inapplicability of the provisions of the New York State Labor Relations Act to plaintiff and to plaintiff's relations with its said supervisory employees, is bringing this action in this court

pursuant to Section 473 of the Civil Practice Act to obtain a judicial determination of the jurisdiction of the Labor Relations Board of the state of New York in the premises, [fol. 17] which is desirable and necessary to prevent the possible unauthorized action on the part of defendants comprising the New York State Labor Relations Board by ordering and holding an election to choose a representative to bargain collectively on behalf of plaintiff's said supervisory employees and to prevent the said Board from attempting to force plaintiff to bargain collectively with representatives of the said Union and to prevent the said Board from taking any further steps directed against plaintiff under the authority which said Board improperly maintains has been given to it by the provisions of the Statutes of the State of New York and particularly to prevent plaintiff from being subjected in the future to conflicting orders and rulings of the New York State Labor Relations Board and the National Labor Relations Board.

Wherefore, plaintiff prays that a declaratory judgment be made and entered herein adjudging and decreeing:

1. That the provisions of the New York State Labor Relations Act (Labor Law, Article 20) do not apply to the plaintiff in the premises.

2. That the provisions of the New York State Labor Relations Act (Labor Law, Article 20) do not apply to the plaintiff in its relations with its supervisory employees at its said Dunkirk mills and plant.

3. That the defendants comprising the New York State Labor Relations Board have no jurisdiction over the plaintiff or over the supervisory employees of the plaintiff at its said plants.

4. That the defendants comprising the New York State Labor Relations Board may not properly certify the Foremen's Association of America, Allegheny Ludlum Steel Corporation Chapter No. 58, as the appropriate collective [fol. 18] bargaining unit for the foremen or other supervisory employees of the plaintiff at its said Dunkirk plant.

5. That the defendants comprising the New York State Labor Relations Board have no jurisdiction to hold an election or to attempt to hold an election for the purpose

of determining a representative of the said supervisory employees to bargain collectively with the plaintiff or to order the plaintiff to bargain collectively with any such representative.

6. That the defendants comprising the New York State Labor Relations Board be restrained and enjoined pending the determination of this action and thereafter from taking any steps which directly or indirectly interfere with the plaintiff in any way and, further, from holding an election or attempting to hold an election for the purpose of determining a representative of the said supervisory employees to bargain collectively with the plaintiff or from taking any other action in connection with plaintiff or its employees under the provisions of the New York State Labor Relations Act.

7. That plaintiff have such other, different and further relief, decree or judgment in the premises as may be just and proper, together with the costs and disbursements of this action.

Moot, Sprague, Marcy & Gulick, Attorneys for Plaintiff., Office and P. O. Address, 302 Erie County Bank Building., Buffalo 2, New York.

[fol. 19] *Duly sworn to by E. J. Hanley. Jurat omitted in printing.*

[fol. 20] IN SUPREME COURT OF NEW YORK, COUNTY OF CHAUTAUQUA

THE ALLEGHENY LUDLUM STEEL CORPORATION, Plaintiff,

against

WILLIAM J. KELLEY and H. MYRON LEWIS, constituting the State Labor Relations Board of the State of New York, Defendants.

AMENDED ANSWER—Filed Oct. 3, 1944

Defendants, by Daniel Kornblum, their attorney, for their amended answer to plaintiff's complaint, allege:

1. Deny each and every allegation contained in paragraphs "12", "13", "14", "16", "17", "18", "20", "21", "22" and "23" of the complaint.

2. Deny each and every allegation contained in paragraph "4" of the complaint, except defendants admit that the jurisdiction authority, powers, duties and functions of the New York State Labor Relations Board, hereinafter called the Board, are as set forth in Article 20 of the Labor Law of the State of New York, known as the New York State Labor Relations Act, hereinafter called the Act.

3. Deny upon information and belief each and every allegation contained in paragraph "5" of the complaint, except defendants admit that Foremen's Association of America, Allegheny Ludlum Steel Corporation Chapter #58, is a labor organization which exists and is constituted for the purpose, in whole or in part, of collective bargaining and of dealing with employers concerning grievances, terms or conditions of employment, or other mutual aid or protection; that its membership is limited to foremen, and that it excludes from membership any "foreman or supervisor, who is an employer of labor, or individual in a position to act as negotiator in the interests of employer policy."

4. Deny each and every allegation contained in para-
[fol. 21] graph "6" of the complaint, except defendants admit that on December 30, 1943, Foremen's Association of America, Allegheny Ludlum Steel Corporation Chapter #58, filed with the New York State Labor Relations Board a petition in writing requesting that the Board investigate a question or controversy allegedly existing concerning the representation of foremen at plaintiff's Dunkirk plant and further requesting that the Board, upon completion of its investigation, certify to the parties the name of the collective bargaining representative selected by such employees.

5. Deny each and every allegation contained in paragraph "7" of the complaint, except defendants admit that hearings, in aid of the New York State Labor Relations Board's investigation of the question or controversy alleged in the said petition referred to in paragraph "4" hereof, were held on February 23 and 24, 1944, before I. L. Broadwin, Esq., one of the said Board's Trial Examiners, that testimony was taken and that records of plaintiff were subpoenaed and received in evidence, and

that argument concerning said question or controversy was heard by the defendant Members of said Board on April 12, 1944.

6. Deny each and every allegation contained in paragraph "8" of the complaint, except defendants admit that at the hearing of February 24, 1944, before said Trial Examiner, plaintiff, by its counsel, William H. Eckert, Esq., made the following motion; "We move that the petition of the Foremen's Association of America, Allegheny Steel Corporation Chapter #58, be dismissed for the reasons briefly, that the New York State Labor Relations Board does not have jurisdiction in this case and because the Foremen's Association of America, Allegheny Ludlum Steel Corporation Chapter #58, is not an appropriate unit for collective bargaining purposes."

7. Deny each and every allegation contained in paragraph "9" of the complaint, except defendants admit that on May 24, 1944, William J. Kelley, O. M. I. and H. Myron Lewis, constituting the New York State Labor Relations Board, duly issued and served upon plaintiff its Decision [fol. 22] and Direction of Election in the proceeding referred to in paragraph "4" hereof, a copy of which is annexed hereto and made a part of this answer with the same force and effect as if set forth at length herein.

8. Deny any knowledge or information thereof sufficient to form a belief as to each and every allegation contained in paragraph "15" of the complaint, except defendants admit, on information and belief, that heretofore the National Labor Relations Board on or about June 29, 1942, certified United Steel Workers of America, C. I. O., as exclusive collective bargaining representative of certain non-supervisory employees at plaintiff's Dunkirk plant.

9. Deny each and every allegation contained in paragraph "19" of the complaint, except defendants admit that on May 24, 1944, defendants, William J. Kelley, O. M. I. and H. Myron Lewis, constituting the New York State Labor Relations Board, duly issued and served upon plaintiff its Decision and Direction of Election in the proceeding referred to in paragraph "4" hereof, a copy of which is annexed hereto and made a part of this answer with the same force and effect as if set forth at length herein.

For a First, Separate and Distinct Affirmative Defense, Defendants Allege:

10. The defendants, William J. Kelley, O. M. L, and H. Myron Lewis, constitute the New York State Labor Relations Board, hereinafter called the Board.

11. The Board is an agency duly established by Article 20 of the Labor Law of the State of New York.

12. The jurisdiction, powers, authority, duties and functions of the Board are as set forth in said Article 20 of the Labor Law.

13. On December 30, 1943, Foremen's Association of America, Allegheny Ludlum Steel Corporation Chapter #58, filed with the Board a petition in writing alleging that a question or controversy exists as to representation [fol. 23] for purposes of collective bargaining of foremen at plaintiff's plant located at Dunkirk, N. Y., and requesting the Board to investigate and certify Foremen's Association of America, Allegheny Ludlum Steel Corporation Chapter #58, as collective bargaining representative of such foremen.

14. Hearings in aid of the Board's investigation as to the alleged question or controversy set forth in said petition were duly held on February 23 and 24, 1944, in Buffalo, New York, before I. L. Broadwin, Esq., a Trial Examiner duly appointed and designated by the Board.

15. At such hearings, plaintiff appeared specially.

16. At such hearings plaintiff was represented by counsel and received full opportunity to and did examine and cross-examine witnesses, offer evidence and received full opportunity to be heard.

17. At said hearings stenographic minutes were taken of all testimony and proceedings, and exhibits were offered and received in evidence.

18. On February 24, 1944, at said hearing before the said Trial Examiner, the following motion was made by plaintiff's counsel, William H. Eckert, Esq.: "We move that the petition of the Foremen's Association of America, Allegheny Steel Corporation Chapter #58, be dismissed for the reasons, briefly, that the New York State Labor

Relations Board does not have jurisdiction in this case and because the Foremen's Association of America, Allegheny Ludlum Steel Corporation Chapter #58, is not an appropriate unit for collective bargaining purposes."

19. Decision on said motion referred to in paragraph "18" above was reserved by the said Trial Examiner.

20. At request of the plaintiff, oral argument was heard by the Board on April 12, 1944.

21. Stenographic minutes were taken of said oral argu- [fol. 24] ment referred to in paragraph "20" above.

22. On May 24, 1944, defendants, William J. Kelley, O. M. I. and H. Myron Lewis, constituting the New York State Labor Relations Board, duly issued and served upon plaintiff its Decision and Direction of Election in the proceeding referred to in paragraph "13" hereof, a copy of which is annexed hereto and made a part of this answer with the same force and effect as if set forth at length herein.

23. The administrative remedies of plaintiff are as set forth in Article 20 of the Labor Law.

24. Plaintiff has not exhausted the administrative remedies provided in Article 20 of the Labor Law.

For a Second, Separate and Distinct Affirmative Defense, Defendants Allege:

25. Defendants reallege each and every allegation contained in paragraphs "10" through "23" inclusive, of this answer with the same force and effect as if set forth at length herein.

26. The exclusive means of judicial review of proceedings before, and acts of, the Board are those provided in Article 20 of the Labor Law.

27. No provision is made for this action in Article 20 of the Labor Law.

28. Plaintiff has an adequate remedy at law.

For a Third, Separate and Distinct Affirmative Defense, Defendants Allege:

29. Defendants reallege each and every allegation in paragraphs "10" through "23" inclusive, and in para-

graphs "26" and "27" of this answer with the same force and effect as if set forth at length herein.

30. This Court does not have jurisdiction of the subject of this action.

[fol. 25] For a Fourth, Separate and Distinct Affirmative Defense, Defendants Allege:

31. Defendants reallege each and every allegation contained in paragraphs "10" through "23" inclusive, and in paragraphs "26" and "27" of this answer with the same force and effect as if set forth at length herein.

32. This Court in its discretion should decline to take jurisdiction of this action.

For a Fifth, Separate and Distinct Affirmative Defense, Defendants Allege:

33. The jurisdiction, powers, authority, duties and functions of the National Labor Relations Board are as set forth in the National Labor Relations Act, United States Code, Title 29, Chapter 27, as amended.

34. Upon information and belief no petition alleging that a question or controversy exists as to representation of foremen for purposes of collective bargaining, at plaintiff's plant located at Dunkirk, or requesting the National Labor Relations Board to investigate and certify Foremen's Association of America, Allegheny Ludlum Steel Corporation Chapter #58, as collective bargaining representative of such foremen, has been filed with the National Labor Relations Board.

For a Sixth, Separate and Distinct Affirmative Defense, Defendants Allege:

35. Defendants reallege each and every allegation contained in paragraph "33" of this answer with the same force and effect as if set forth at length herein.

36. The National Labor Relations Board has not assumed or asserted jurisdiction of any alleged question or controversy concerning representation of foremen for purposes of collective bargaining, at plaintiff's plant located in Dunkirk, N. Y.

37. The National Labor Relations Board has not assumed or asserted jurisdiction of any request to certify Foremen's Association of America, Allegheny Ludlum Steel [fol. 26] Corporation Chapter #58, as representative of foremen for purposes of collective bargaining at plaintiff's plant located in Dunkirk, N. Y.

Wherefore, defendants pray that judgment be made and entered herein, adjudging and decreeing that the complaint herein be dismissed, and that defendants have such other, different and further relief, decree or judgment in the premises as may be just and proper, together with the costs and disbursements of this action.

Dated: New York, N. Y., May 24, 1944.

Daniel Kornblum, Attorney for Defendants. Office & P. O. Address, 250 West 57th Street, Borough of Manhattan, 19, City of New York.

[fol. 27] BEFORE THE STATE LABOR RELATIONS BOARD, STATE OF NEW YORK

Decision No. 2751. Case No. WE-373

In the Matter of ALLEGHENY LUDLUM STEEL CORPORATION and FOREMEN'S ASSOCIATION OF AMERICA, ALLEGHENY LUDLUM STEEL CORPORATION CHAPTER No. 58

Appearances:

Ernest E. Cavagnaro, Esq., for the Board.

Smith, Buchanan & Ingersoll, Esqs., by William H. Eckert, Esq., and Moot, Sprague, Marcy & Gulick, Esqs., by Wells V. Moot, William Cannable and William Gage, Esqs., appearing specially for the Employer.

Walter M. Nelson, Esq., and Edward J. Greder, Jr., for Foremen's Association of America, Allegheny Ludlum Steel Corporation Chapter No. 58.

Robert H. Keys for Foremen's Association of America.

Neal J. Cunningham for American Federation of Labor.

DECISION AND DIRECTION OF ELECTION

Statement of the Case

On December 30, 1943, Foremen's Association of America, Allegheny Ludlum Steel Corporation Chapter No. 58,

unaffiliated, herein, called the Union, petitioned the Board, pursuant to Section 705 of the New York State Labor Relations Act, to investigate an alleged question or controversy concerning the representation of foremen employed by the Company at its Dunkirk, N. Y., plant.

A hearing was held in Buffalo, N. Y., before I. L. Broadwin, Trial Examiner, on February 23 and 24, 1944. The Company appeared specially to challenge the jurisdiction of the Board. Both the Company and the Union participated in the hearing, the former without waiving its special appearance, and both were afforded full opportunity to be heard, to examine and cross-examine witnesses and to introduce evidence bearing upon the issues. At the close of the hearing, the Company moved to dismiss the petition on the grounds that the Board does not have jurisdiction of this case and that the unit sought, consisting of supervisory employees, was not appropriate for collective bargaining purposes. Decision was reserved. For reasons stated hereinafter, the motion is denied.

[fol. 28] At the hearing, a representative of the American Federation of Labor attended but offered no formal appearance in the proceeding. He was informed by the Trial Examiner of his right under the Board's rules to file a written petition to intervene on behalf of his organization. However, no such petition was filed in its behalf, nor was any proof of its interest in this matter offered. Accordingly, the American Federation of Labor is not made party to this proceeding.

In the course of the hearing, a carbon copy of a letter sent by Edward J. Greder, Jr., president of Chapter 58, to F. B. Lounsberry, the Company's vice-president in charge of manufacturing at Brackenridge, Pa., was received as Board's Exhibit No. 19 for identification. Counsel for the Company consented that the letter be marked in evidence if, upon investigation, he ascertained that the original had been received by the Company. The Board has since been notified by a letter from counsel for the Company that the original had been received by the Company. Accordingly, the letter so marked for identification, together with the letter admitting receipt of the original, is received in evidence and marked as a single exhibit, "Board's Exhibit No. 19."

At the request of the Company, oral argument was heard by the Board on April 12, 1944. In addition, various briefs

have been filed by both the Company and the Union. The Board has duly considered the record of the oral argument and the briefs.

Upon the entire record in the case, the Board makes the following

Findings of Fact

I. The Employer

Allegheny Ludlum Steel Corporation is a Pennsylvania corporation licensed to do business in New York. Its main office and principal plant are located in Brackenridge, Pa. It also has plants in Leechburg, Pa., Dunkirk, N. Y., in Michigan and California. In addition, it maintains warehouses in various other states.

The instant case involves only the Company's division at Dunkirk, N. Y. The Dunkirk branch is made up of two plants situated on adjoining pieces of land, although the two buildings are not contiguous. One of the plants is known as the Howard Avenue plant and is owned outright by the Company. The other is known as the Brigham Road plant; it is owned by the United States Government through the Defense Plant Corporation which, in turn, leases the plant and equipment in its entirety to the Company. The Company operates the two plants as a single unit, and they are referred to jointly as the Dunkirk plant.

At the Dunkirk plant, the Company manufactures tube steel, alloy steel, valve steel and stainless steel. It employs about 2100 rank and file workers. There are also about 46 foremen, shift foremen, general foremen, and general shift foremen, who are the only employees involved in the present proceeding. In addition, the plant employs the services of a general manager, assistant general manager, production manager, manager, superintendents, shift superintendents, assistant superintendents, and supervisors.

About 95%, by value, of the products produced at the Dunkirk plant are shipped to points outside of New York State. About 86%, by value, of the raw materials used at the Dunkirk plant are brought from points outside New York State. About 85%, by value, of partially fabricated materials are brought to the Dunkirk plant from points outside New York State for further fabrication. The Union concedes that the Company is engaged in interstate commerce.

[fol. 29] II. The Employees Involved

The present case involves only the formen, shift foremen, general foremen and general shift foremen employed by the Company at its Dunkirk plant. There are about 46 such employees, all of them full time employees; there are no part-time, temporary or casual employees in these groups.

To a large extent, their classification depends upon the number of foremen in a department. There is no difference between the duties of "foremen" and "shift foremen" only that the first title applies in a department which works but one shift during the day, and the latter if the department works two or three shifts during the day. The same descriptive distinction applies as between general foremen and general shift foremen.

A foreman or shift foreman has immediate supervision over the rank and file employees in a given department. Where a certain process of manufacture utilizes more than one department, there is a general foremen or a general shift foreman over all foremen or shift foremen involved in the process. This is to coordinate the work of the various foremen or shift foremen so that the process operates as a unified whole. On questions of production, the general foreman or general shift foreman has authority superior to that of the foremen or shift foreman. But on matters affecting personnel their authority is no greater. Nor do the general foremen and general shift foremen have any control over the terms and conditions of employment of the foremen and shift foremen.

About 30 of the employees here involved are compensated on the basis of hourly rates of pay plus bonuses. These computations are made at and paid directly in Dunkirk. The remaining 16 employees are paid a monthly salary in the form of semi-monthly checks which are sent from the Brackenridge, Pa., office. Those paid monthly receive slightly higher compensation than those paid hourly rates. Generally speaking, those receiving monthly salaries include the general foremen and general shift foremen, while all of those paid on an hourly basis are foremen or shift foremen.

For convenience, we will heinafter refer to all four of these groups as "foremen," since for the purposes of this case the parties have treated them alike.

The Limits of Supervisory Authority of the Foremen

The general duties of the foremen are to supervise the rank and file employees, to lay out and assign work, to see that instructions are carried out, to check on absenteeism and assign other workers to fill in for absentees. The Union concedes that the foremen are supervisory employees. They spend their full time supervising others and do no manual work.

However, the Company concedes that these foremen are not executives and do not participate in the formulation of managerial policies. They do not represent the Company in collective bargaining negotiations with the labor organization representing the rank and file employees. They do not have access to the Personnel Department's confidential information concerning the rank and file employees.

The foremen have no authority to hire, fire, promote or demote rank and file employees. All they may do is to recommend such action to their superiors, the superintendents or assistant superintendents who, in turn, must pass the recommendation on to still higher officials. Those who have final authority always consult with the foremen concerned before taking any such action. The final authority [fol. 30] on all these matters lies with the general manager, or with an impartial umpire if the union representing the rank and file employees takes up the matter as a grievance. The recommendations of the foremen are given "serious consideration" by those having final authority, and the general manager of the Dunkirk plant testified that the foremen's recommendations are accepted in a majority of cases, but not always.

Grievances of rank and file employees are first taken up with the foremen by the shop steward of the union representing the rank and file employees. Many grievances are settled at this stage. If not so adjusted, the union may take them up in writing with the superintendent and if not settled then, they are presented to a grievance committee consisting of representatives of the union and the Company. The Company's representatives investigate the matter, during which they obtain from the foreman his version of the dispute and his recommendations. Again this recommendation is given "serious consideration" by the Company and is generally accepted by it. If no settlement is

reached by the grievance committee, the matter may then be referred to an impartial umpire.

The foremen have no authority to grant wage increases to rank and file employees. The most they can do is orally to recommend an increase to the superintendent who, if he approves, passes the recommendation on to higher authorities. The recommendations of the foremen are not always accepted. Only the general manager can grant an increase. If he denies it, the union may then take up the matter as a grievance through the regular procedure outlined in the preceding paragraph.

Supervision of the Foreman

The foremen here involved are on the lowest rung of the supervisory ladder. They are subordinate to, and under the immediate supervision of, the superintendents, assistant superintendents or supervisors who, in their turn, have a manager or production manager over them. In ultimate charge of the Dunkirk plant is the general manager and an assistant general manger who, in turn, are responsible to officials in the Company's main office. The general manager has the final authority on promotions and demotions of foremen.

No one is hired from the outside as a foreman. All foremen are taken by promotion from among the rank and file employees. Indeed, the contract between the Company and the union representing the rank and file employees specifically provides that "in all cases of promotion, demotion and increase or decrease of forces, length of service and ability to perform the work shall be determining factors."[1]

If new foremen are unsatisfactory or if business falls off, they are demoted to their former positions as rank and file employees. The seniority of an employee so demoted accumulates during his tenure as a foreman and he receives, its benefit upon again becoming a rank and file employee. Thus, the fact that the rank and file employees are represented by a union seems to offer no obstacle to the promotion by the Company of some of them to the position of foreman.

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[1] Board's Exhibit No. 16 in Evidence, #6, p. 18.

From all the evidence we find that the foremen, shift foremen, general foremen and general shift foremen employed by the Company at its Dunkirk plant are "employees" of the Company within the meaning of Section 701, subdivision 3, of the Act.

[fol. 31] III. The Union

Foremen's Association of America, Allegheny Ludlum Steel Corporation Chapter No. 58, is a labor organization which exists and is constituted for the purpose, in whole or in part, of collective bargaining and of dealing with employers concerning grievances, terms or conditions of employment, or other mutual aid or protection. Its membership is limited to foremen. It excludes from membership any "foreman or supervisor, who is an employer of labor, or individual in a position to act as negotiator in the interests of employer policy."

The Foremen's Association of America is not affiliated with any other labor organization and has no connection with the United Steelworkers of America, C. I. O., which represents the rank and file employees. The Association has about 22,000 members. While at present the Association has no signed collective bargaining contracts with any employer, it has had, and continues to have, collective bargaining relations with various companies, but not with Allegheny Ludlum Steel Corporation.

IV. The Jurisdiction of the Board

The Company asserts that the Board has no jurisdiction in the instant case because of alleged conflict between the National Labor Relations Board and the New York State Labor Relations Board on the question of whether or not supervisory employees may constitute a unit appropriate for the purposes of collective bargaining.

The Company's argument in substance runs as follows: The Company is engaged in interstate commerce and is amenable to control by the Federal Government. Congress, through its power to regulate interstate commerce, has "assumed control" of the field here involved, by enacting the National Labor Relations Act (U. S. Code, Title 29, ch. 27). In turn, the National Labor Relations Board has "assumed juridiction" of the dispute here in question in that it has decided that units of supervisory employees are

not appropriate for purposes of collective bargaining (*Matter of The Maryland Drydock Company*, 49 N. L. R. B. 733, and other similar cases). In addition, the Company refers to Section 715 of the New York State Labor Relations Act which provides in apposite part as follow:

> "The provisions of this article shall not apply to the employees of any employer who concedes to and agrees with the Board that such employees are subject to and protected by the provisions of the national labor relations act * * *"

It claims that it has offered to enter into an agreement such as that contemplated by the provision but the Board has declined the Company's offer. The nature of the Company's offer and the reasons for the Board's rejection of it appear hereafter. The Company concludes that the question or controversy here involved comes under the sole jurisdiction of the National Labor Relations Board, and, therefore, the State Board may not act.

The Board cannot agree with either the reasoning employed or the conclusion reached by the Company.

The Constitutional Basis for the Act

It cannot be denied that under the Constitution of the United States the several states have plenary power and full sovereignty, except as to those things expressly denied to them, or granted to the Federal Government,[2]

[fol. 32] Nor can it be denied that one the principal attributes of sovereignty reserved to the states is the police power which the state may employ to maintain peace and order among persons located and businesses operated within its confines.

The State of New York has exercised its police power in regard to industrial and labor relations within the borders of the State by the passage of the New York State Labor Relations Act, Article 20 of the Labor Law. In Section 700 of the Act, the Legislature has made its findings of fact and declaration of the public policy of the State. This section reads in part:

> "When some employers deny the right of employees to full freedom of association and organization, and

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[2] U. S. Constitution, Amend. X.

refuse to recognize the practice and procedure of collective bargaining, their actions lead to strikes, lockouts and other forms of industrial strife and unrest which are inimical to the public safety and welfare, and frequently endanger the public health."

Accordingly, the Legislature, codifying the common law rights of employes within the State, provided in Section 703 of the Act:

"Employees shall have the right of self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection . . ."

These rights have now been made a part of the Constitution of the State. Article I, Section 17, of the New York State Constitution provides:

"Employees shall have the right to bargain collectively through representatives of their own choosing."

In order to facilitate the exercise of these constitutional, statutory and common law rights, and to maintain industrial peace within the State, the Legislature, by Article 20 of the Labor Law, has established the New York State Labor Relations Board and has provided in Section 705 (2) of the Act:

"The Board shall decide in each case whether, in order to insure to employees the full benefit of their right to self-organization, to collective bargaining and otherwise to effectuate the policies of this article, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or any other unit . . ."

Absence of Conflict Between Federal and State Law

It is clear that the mere existence of the National Labor Relations Act does not prevent the State from regulating the industrial and labor relations of employers and employees located within the State, even though that regula-

tion may indirectly affect interstate commerce. The power of the Federal Government and of the State Government, so long as there is no conflict between them, is concurrent.[3] The purposes of the National Labor Relations Act and the New York State Labor Relations Act are similar; the very language of the two Acts is almost identical.[4]

[fol. 33] Both Boards are empowered to decide "in each case", what unit is appropriate for purposes of collective bargaining.[5] Thus, it is not contended here, because it cannot be so contended, that the two Acts are in conflict; the only asserted "conflict" is said to be in the action of the two Boards. In the instant case, the fact is that there is no such "conflict".

The National Labor Relations Board has not taken jurisdiction of the particular question or controversy involved in the instant case. No petition involving the foremen employed at the Company's Dunkirk plant has been filed with the National Labor Relations Board by either the Union or the Company. Indeed, a letter from the Buffalo Regional Attorney of the National Labor Relations Board to the Buffalo Regional Attorney of the New York State Labor Relations Board has been received in evidence, advising that such a petition would be dismissed by the National Board.[6] The sole action taken by the National Labor Relations Board affecting the Company's Dunkirk plant concerned only the rank and file employees. There, after an election, the National Board certified the Steel Workers Organizing Committee, C. I. O., as the exclusive bargaining representative of the rank and file employees, following which a collective bargaining contract was entered into between that labor organization and the Company. But the foremen at the Dunkirk plant were in no way involved in that proceeding, or any other before the National Board.

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[3] *Davega City Radio, Inc. v. Boland, et al.*, 281 N. Y. 13; *Allen-Bradley Local, etc. v. Wisconsin Employment Relations Board*, 315 U. S. 740.

[4] *Davega City Radio, Inc. v. Boland, et al.*, 281 N. Y. 13, 22; *N. Y. S. L. R. B. v. Timen*, 264 A. D. 120, 122; *N. Y. S. L. R. B. v. Interborough News Co.*, 170 Misc. 347, 348.

[5] National Labor Relations Act, Sec. 9(b); New York State Labor Relations Act, Sec. 705(2).

[6] Board's Exhibit 7.

In many cases, commencing with *Matter of The Maryland Drydock Company* 49 N. L. R. B. 733, the National Labor Relations Board, while holding that foremen are "employees" within the meaning of the National Act, has declined to certify units composed of foremen or other employees with supervisory duties as appropriate for purposes of collective bargaining. In other cases, the National Board has made exceptions to this doctrine and has certified units of foremen as appropriate for bargaining, as where there has been a history of bargaining by foremen in the particular industry.[7] In the recent case of *Matter of Soss Manufacturing Company, etc.*, N. L. R. B. —, 14 L. R. R. 325 (May 8, 1944), the National Board, although deciding that foremen may not be discharged because of their union membership, reaffirmed its holding in *The Maryland Drydock* case, supra. Accordingly, except as above noted, the National Labor Relations Board will not entertain petitions for units of foremen; it will not certify as appropriate a unit of foremen; and it will not order an employer to bargain with a unit of foremen. So far as collective bargaining is concerned, the situation is exactly the same as if the National Labor Relations Act exempted foremen, like agricultural workers,[8] from its coverage. Certainly, in the absence of federal regulation of the particular field, the State is, at the least, free to make its own regulations to govern the relationship between foremen and their employers located within the State.[9] Surely, too, there is ample reason for such regulation when a denial of resort to the peaceful machinery of the State Act may force foremen to invoke lawful economic measures to achieve collective recognition.

[fol. 34] The issue in the present case is whether foremen may constitute an appropriate bargaining unit. This is a question of fact, and the Board's finding in that connection is merely a finding of fact.[10] Thus, even assuming, argu-

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[7] *Matter of W. F. Hall Printing Co.*, 51 N. L. R. B. 640; *Matter of Leo Lichtenstein, et al (Harlich Manufacturing* Company), 55 N. L. R. B. No. 259, 14 L. R. R. 300 (April 19, 1944).

[8] National Labor Relations Act, Section 2, subdivision 3.

[9] See cases cited in footnote No. 3, supra.

[10] *Metropolitan Life Insurance Company v. N. Y. S. L. R. B.*, 280 N. Y. 194, 208-9.

endo, that the foremen here involved had been before the National Board, the possibility of different fact findings on the same record by the National and the State Boards does not create a conflict of jurisdiction between them.[11] Reasonable men may differ over the issues involved in determining an appropriate unit, for example, whether it should include a whole plant or be limited to a single department or craft. Surely the State Board is not powerless to make a finding on this question in every case because of the possibility that the National Board on the same record might make a different finding of fact. It is the ultimate orders of the two Boards, and not their fact findings on the question of appropriate unit, that are material. Unless there is conflict between their final orders, unless the one orders what the other prohibits, there is no conflict between them.

While the National Labor Relations Board itself will not affirmatively order an employer to bargain with a unit of foremen, it certainly will not order the employer *not* to bargain with the representatives chosen by such a unit. Neither the National Labor Relations Board nor anything in the National Labor Relations Act or any other federal law prohibits an employer and a union representing a unit of foremen from bargaining. This is made clear by the National Labor Relations Board itself in its recent decision in *Matter of Soss Manufacturing Company, etc.*, N L. R. B. —, 14, L. R. R. 325 (May 8, 1944), where the Board said:

> "Moreover, our opinion in that case (Maryland Drydock, supra) did not illegalize collective bargaining outside the framework of the [National Labor Relations] Act for the supervisors' organizations. An employer, should he be so disposed, may still elect with legal immunity voluntarily to bargain with the labor organization composed of supervisors, provided that such bargaining does not also have the effect of interfering with the protected rights of other employees. It is true that in the Maryland Drydock case the Board announced that (full benefit of their [the employees'] right to self-organization and to collective bargaining, would not be insured were an employer subject to an

[11] *Allen-Bradley Local, etc., v. Wisconsin Employment Relations Board*, 315 U. S. 740, 745-6.

order to bargain with employee supervisor groups. But it is quite another matter to say that this holding created a prohibition against voluntary recognition and the establishment of collective bargaining relationships by mutual agreement between employers and supervisory employees."

It is thus obvious that if the State Board finds that, within the meaning of the State Act, the foremen here involved constitute an appropriate bargaining unit, and if the State Board further orders the Company, pursuant to Sections 704(6) and 706 of the State Act, to bargain with the duly selected representatives of these foremen, such action would not be in conflict with anything that would be ordered or prohibited by the National Labor Relations Board. Collective bargaining "outside the framework" of the National Labor Relations Act is not made illegal by any federal law, rule, regulation or order. An employer [fol. 35]may bargain with the representatives of his supervisory employees "with legal immunity" under the Federal law. Such bargaining with the representative of the foremen in the instant casefi assuming that the petitioning Union is duly selected by the employees in the election directed herewith, would not interfere with the "protected rights" of the rank and file employees at the Company's Dunkirk plant. The petitioning Union is an unaffiliated labor organization which rank and file employees are not eligible to join, and it has no connection of any kind with the labor organization presently representing the rank and file employees at the Company's Dunkirk plant.

We therefore find that there is no conflict between any order which the New York State Labor Relations Board ultimately may issue directed to the Company, and any Federal law, rule, regulation or order.

Section 715 of the Act Does Not Deprive the Board of Jurisdiction

Section 715 of the State Act reads in part:

"The provisions of this article shall not apply to the employees of any employer who concedes to and agrees with the board that such employees are subject to and

protected by the provisions of the national labor relations act. . . ."

The Company asserts that this provision deprives the Board of jurisdiction in the instant case. That contention was emphatically rejected by the Court of Appeals in *Davega City Radio, Inc. v. Boland, et al.*, 281 N. Y. 13, where the Court said at p. 25:

> "Appellant contends that since its employees are protected by the National Act, the State law, because of the above provision, does not apply. Such is not the language of the statute. It does not exempt from its jurisdiction all who are subject to the National Act but only those as to whom the employer and the Board agree are subject to the National Act. In the case at bar the Board has not agreed with the employer that the latter is subject to the National Labor Relations Act. Hence, appellant is not exempted by the operation of this section."

And so in the instant case, the Board has declined to agree with the Company that as to collective bargaining by the foremen at its Dunkirk plant, the Company is subject to the National Labor Relations Act. It is obvious that so far as collective bargaining is concerned, the foremen here involved are not "protected" by the provisions of the National Act. Indeed, when the Company sought to invoke the consent provision of Section 715 it by no means offered to agree that its *foremen* at the Dunkirk plant were "protected" by the National Act. And it is very doubtful that even if it did so offer, it could thereby confer jurisdiction on a National Board which might decline it.

Upon the entire record, we find that the New York State Labor Relations Board has jurisdiction of the question or controversy hereinafter found to exist between the Company and the Union concerning the representation of the foremen employed by the Company at its Dunkirk, N. Y., plant.

V. The Question or Controversy Concerning Representation

The Company and the Union disagree as to whether supervisory employees may constitute an appropriate bargaining unit. Further, the Company declines to re-

cognize the Union as the collective bargaining representative of its employees in any unit. We therefore find that a question or controversy exists concerning the repre- [fol. 36] sentation of foremen at the Company's plant located at Dunkirk, N. Y.

This question or controversy may lead to strikes, lockouts and other forms of industrial strife and unrest which are inimical to the public safety and welfare and endanger the public health of the people of the State of New York. The exercise of the police power of the State of New York in relation to this question or controversy is necessary for the protection of the public welfare, prosperity, health and peace of the people of the State of New York. The Board is fully conscious of the industrial unrest that would follow from a failure to afford the employees here involved access to the peaceful machinery of the Board. Moreover, the Board is mindful of the fact that a denial of resort to the Act may constitute a denial of these employees' constitutional rights.[12]

VI The Appropriate Unit

The Union asks the Board to find that the foremen, shift foremen, general foremen and general shift foremen employed by the Company at its Dunkirk plant constitute a unit appropriate for the purposes of collective bargaining. The Company, while conceding that these classifications of employees are "employees" within the meaning of Section 701, subdivision 3, of the Act, contends that they cannot constitute an appropriate unit because of the supervisory nature of their duties.

As noted above, the foremen here involved are on the lowest rung of the supervisory ladder. They are the immediate supervisors above the rank and file workers. In turn, there are several strata of supervision above the foremen; supervisors, assistant superintendents, superintendents or shift superintendents, manager or production manager, assistant general manager, general manager, and still higher officials at the main office. It is conceded that these foremen have no executive responsibilities, do not participate in the formulation of managerial policies, and do not negotiate on behalf of the Company or participate in collective bargaining between the Company and the rank

[12] Art. I, §17, of the New York State Constitution, supra.

and file employees. They have no financial interest in the Company.

The Board has considered the status of employees with like supervisory duties in several previous cases and has determined that they may be included in a bargaining unit limited to employees similarly situated. For the Board's rationale, reference is made to our prior decisions in *Matter of Williamsburgh Power Plant Corp.*, 1 S. L. R. B. 653 (1938); *Matter of Siegel & Fried, Inc.*, 3 S. L. R. B. 150 (1940); *Matter of Rexton Realty Company*, 4 S. L. R. B. 1180 (1941); *Matter of Bee Line, Inc.*, Dec. No. 2579, 6 S. L. R. B. —— (1943); *Matter of Metropolitan Life Insurance Company, etc.*, Dec. No. 2591, 6 S. L. R. B. —— (1943); *Matter of Delparke Realty Corporation, etc.*, Dec. No. 2643, 6 S. L. R. B. —— (1943).

In *Matter of Bee Line, Inc.*, supra, where the facts were similar to those in the instant case, the Board said:

> "When the other criteria for constituting an appropriate bargaining unit are met, the Board cannot find that the unit requested is inappropriate solely because the employees within it perform some supervisory tasks. In effect this denies them all bargaining rights under the Act. According to Section 705, subdivision 2 of the Act, the purpose of establishing an appropriate unit is to insure employees the full benefit of their right to selforganization and to collective bargaining, and otherwise to effectuate the policies of the Act. This [fol. 37] contemplates that the Board shall establish that unit as appropriate which will best achieve those ends. The concept of appropriate unit is an affirmative one, intended to bring about the most desirable form of organization. It is not a negative concept to be used as a means of denying all bargaining rights under the Act to a given group of employees in all circumstances. Once it is determined that a group of persons are employees, they have a right under the Act and the Constitution of the State of New York to be placed in some appropriate unit—that one which will best facilitate their participation in the practice and procedure of collective bargaining."

Upon the entire record, we find that in order to insure the employees concerned the full benefit of their right to

self-organization, to collective bargaining, to promote industrial peace within the State, and otherwise to effectuate the policies of the Act, the foremen, shift foremen, general foremen and general shift foremen employed by the Company at its Dunkirk plant constitute a unit appropriate for the purposes of collective bargaining. The general manager, assistant general manager, production manager, manager, superintendents, shift superintendents, assistant superintendents and supervisors * will be excluded from the bargaining unit. The company did not challenge the appropriateness of this unit, apart from its contention that supervisory employees may not constitute a bargaining unit.

VII. *The Evidence Concerning Representation*

Of the approximately 46 foremen within the appropriate unit, the Union presented 35 cards applying for membership in the Union, the signatures of which compared favorably with those on pay checks submitted by the Company. The Union also presented a petition signed by this same group of employees requesting that the Union be recognized as the sole bargaining agency for the employees within the appropriate unit, in regard to wages, hours and conditions of employment. However, the Company does not concede that the Union represents a majority of the employees within the appropriate unit. We, therefore, find that an election by secret ballot is necessary to determine their present desires. In accordance with our usual procedure, eligibility to vote in the election will be determined by the payroll dates immediately preceding the date of this Decision and Direction of Election.

Conclusions of Law

Upon the foregoing Findings of Fact and upon the entire record of this proceeding, the Board finds and concludes as a matter of law:

1. Foremen's Association of America, Allegheny Ludlum Steel Corporation Chapter No. 58, is a labor organization within the meaning of Section 701, subdivision 5, of the Act.

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*As shown on the Company's organization chart (Board's Exhibit 14).

2. The foremen, shift foremen, general foremen and general shift foremen employed by Allegheny Ludlum Steel Corporation at its Dunkirk, N. Y., plant are employees within the meaning of Section 701, subdivision 3, of the Act.

[fol. 38] 3. Allegheny Ludlum Steel Corporation is an employer of the employees described in paragraph "2" above, within the meaning of Section 701, subdivision 2, of the Act.

4. A question or controversy has arisen concerning the representation for the purposes of collective bargaining of the foremen, shift foremen, general foremen and general shift foremen employed by Allegheny Ludlum Steel Corportation at its Dunkirk, N. Y., plant within the meaning of Section 705, subdivision 3, of the Act.

5. The New York State Labor Relations Board has jurisdiction of the question or controversy mentioned in paragraph "4" above, within the meaning of Section 705 of the Act.

6. The question or controversy mentioned in paragraph "4" above, may lead to strikes, lockouts and other forms of industrial strife and unrest which are inimical to the public safety and welfare, and endanger the public health of the people of the State of New York, within the meaning of Section 700 of the Act.

7. The National Labor Relations Board has not taken jurisdiction of the question or controversy mentioned in paragraph "4" above, within the meaning of the National Labor Relations Act.

8. The New York State Labor Relations Board has not agreed with Allegheny Ludlum Steel Corporation that the foremen, shift foremen, general foremen and general shift foremen employed by Allegheny Ludlum Steel Corporation at its Dunkirk, N. Y., plant are subject to and protected by the provisions of the National Labor Relations Act, within the meaning of Section 715 of the New York State Labor Relations Act.

9. The foremen, shift foremen, general foremen and general shift foremen (excluding the general manager, assistant general manager, production manager, manager, super-

intendents, shift superintendents, assistant superintendents and supervisors*) employed by Allegheny Ludlum Steel Corporation at its Dunkirk, N. Y., plant, constitute a unit appropriate for the purposes of collective bargaining, within the meaning of Section 705, subdivision 2, of the Act.

DIRECTION OF ELECTION

By virtue of and pursuant to the powers vested in the New York State Labor Relations Board *of* Section 705 of the New York State Labor Relations Act, it is hereby

Directed, that, as part of the investigation authorized by the Board, an election by secret ballot shall be conducted within thirty (30) days from the date hereof, under the supervision of the Board or its agents, at a time, place and during hours to be fixed by the Board, among the foremen, shift foremen, general foremen, and general shift foremen (excluding the general manager, assistant general manager, production manager, manager, superintendents, shift superintendents, assistant superintendents and supervisors *) employed by Allegheny Ludlum Steel Corporation at its Dunkirk, N. Y., plant, during the payroll period immediately preceding the date of this Direction of Election (other than those who have voluntarily quit or have been discharged for cause) to determine whether or not they desire to be represented by Foremen's Association of America, Allegheny Ludlum Steel Corporation Chapter No. 58 for the purposes of collective bargaining concerning rates of pay, wages, hours and other terms and conditions of employment.

[fol. 39] Rev. William J. Kelley, O. M. I., Chairman (Seal), H. Myron Lewis, Member.

Dated: New York, N. Y. May 24, 1944.

To: Allegheny Ludlum Steel Corporation (R), Howard Avenue, Dunkirk, N. Y.; Smith, Buchanan & Ingersoll, Esqs., 1025 Union Trust Building, Pittsburgh, Pa.; Moot, Sprague, Marcy & Gulick, Esqs., 302 Erie County Savings Bank Building, Buffalo 2, N. Y.; Foremen's Association of America (R), 515 Barlum Tower, Detroit 26, Mich.; Walter

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*As shown on the Company's organization chart (Board's Exhibit 14).

M. Nelson, Esq., 1438 Dime Building, Detroit 26, Mich.; American Federation of Labor (R), 311 White Building, Buffalo, N. Y.; Foremen's Association of America: Allegheny Ludlum Steel Corporation Chapter No. 58 (R), 29 Howard Avenue, Dunkirk, N. Y.

[fol. 40] *Duly sworn to by H. Myron Lewis. Jurat omitted in printing.*

[fol. 41] AFFIDAVIT OF SERVICE BY MAIL

State of New York, City of New York, County of New York, ss:

Lillian Schwartz, being duly sworn, deposes and says that she is a clerk in the office of Daniel Kornblum the attorney for the above named defendants herein. That on the 24th day of May 1944 she served the within Amended Answer upon Moot, Sprague, Marcy & Gulick, Esqs., the attorneys for the within named plaintiff by depositing a true copy of the same securely enclosed in a postpaid wrapper marked Registered-Special Delivery, R. R. R. in a Branch Post-Office maintained by the United States Government at 10 West 60 St. (Columbus Circle Station) in said County of New York directed to said attorneys for the plaintiff at No. 302 Erie County Savings Bank Bldg., Buffalo 2, N. Y., that being the address within the State designated by them for that purpose upon the preceding papers in this action, as the place where they then kept an office, between which places there then was and now is a regular communication by mail.

Deponent is over the age of twenty-one years.

Sworn to before me this 25th day of May, 1944.

Lillian Schwartz, William J. Peterson, Notary Public, Queens Co. No. 1627.

[fol. 42] IN SUPREME COURT OF NEW YORK, COUNTY OF CHAUTAUQUA

[Title omitted]

NOTICE OF MOTION

SIRS:

Please Take Notice that upon the complaint and amended answer in this action the undersigned will move this Court, at a Special Term for motions, to be held at the County Court House, Mayville, in the County of Chautauqua, State of New York, on the 13th day of June, 1944, at 10:00 o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard, pursuant to Section 476 of the Civil Practice Act and Rule 112 of the Rules of Civil Practice, for an order granting judgment dismissing the complaint on the ground that on the face of the pleadings herein the defendants are entitled to the relief requested in their amended answer, and on the ground that the complaint does not state facts sufficient to constitute a cause of action, and for such other, further and different relief as to this Court may seem just and proper, together with the costs of this motion and of this action;

Please Take Further Notice that upon the complaint and amended answer herein, the annexed affidavit of H. Myron Lewis, sworn to the 31st day of May, 1944, and the annexed affidavit of Ernest E. Cavagnaro, sworn to the 31st day of May, 1944, the undersigned will move this Court at the same time and place, pursuant to Rule 113 of the Rules of Civil Practice for an order dismissing the complaint herein and directing that judgment to that effect be entered herein in favor of the defendants on the ground that the action has no merit, and for such other, further [fol 43] and different relief as to the Court may seem just and proper together with the costs of this motion and of this action.

Dated: New York, N. Y. June 2, 1944.

Yours, etc., Daniel Kornblum, Attorney for Defendants. Office and P. O. Address, 250 West 57th Street, Borough of Manhattan 19, City of New York.

To: Moot, Sprague, Marcy & Gulick, Esqs., Attorneys for Plaintiff. Office & P. O. Address, 302 Erie County Savings Bank Building, Buffalo 2, New York.

[fol. 44] IN SUPREME COURT OF NEW YORK, COUNTY OF CHAUTAUQUA

[Title omitted]

AFFIDAVIT OF H. MYRON LEWIS—Filed October 3, 1944

STATE OF NEW YORK,
City of New York,
County of New York ss:

H. Myron Lewis, being duly sworn, deposes and says:
I am one of the defendants herein and a Member of the New York State Labor Relations Board.

1. This affidavit is respectfully submitted in support of the Board's motion, pursuant to Rule 113 of the Rules of Civil Practice, for summary judgment dismissing the complaint.

2. This action was commenced by service of a summons and verified complaint on April 14, 1944. On May 24, 1944 a verified amended answer was duly served.

3. In a proceeding entitled "In the Matter of Allegheny Ludlum Stee' Corporation—and—Foremen's Association of America, Allegheny Ludlum Steel Corporation Chapter No. 58," case number WE-373 on the records of the Board, the Board on May 24, 1944 duly issued and served its Decision and Direction of Election. The Decision and Direction of Election are annexed to, and made part of, the Board's amended answer.

4. The direction of election does not order or require the plaintiff to do or refrain from doing anything, as reference to page 12 thereof will show.

[fol. 45] Jurisdiction

5. Plaintiff, in this action, seeks a declaratory judgment that the Board may not hold the projected election, on the ground that the National Labor Relations Board has assumed jurisdiction over such matters, that its jurisdiction is exclusive and, therefore, that the defendant Board has no jurisdiction to proceed.

6. It is the fact, as alleged in the fifth and sixth affirmative defenses at pages 6 and 7 of the Board's amended

answer herein, that no petition alleging that a question or controversy exists as to representation for the purposes of collective bargaining of foremen employed at plaintiff's plant at Dunkirk, New York, or requesting the National Labor Relations Board to investigate and certify the union as collective bargaining representative of such foremen has been filed with the National Labor Relations Board. Nor has the National Labor Relations Board assumed or asserted jurisdiction of any alleged question or controversy concerning representation of such foremen at plaintiff's plant, or of any request that the union be certified as representative for purposes of collective bargaining of such foremen. No proceeding as to such foremen at plaintiff's plant is pending before the National Labor Relations Board.

7. Indeed on February 21, 1944 we inquired as to whether any such petition had been filed with the National Labor Relations Board. By letter dated February 22, 1944, we were told by the Regional Director of the National Board at Buffalo, M. S. Ryder, Esq., that not only had no petition as to plaintiff's foremen at Dunkirk been filed, but that under the National Board's policy, the petition would not have been entertained. A copy of that letter is hereto annexed and marked Exhibit "A".

Harmonious Relations

8. Plaintiff's unparticularized allegations that if the projected election is held it will "destroy the harmonious relations between plaintiff and its supervisory employees" [fol. 46] and will "defeat the purpose of the Act by causing instead of preventing labor disputes," are wholly without substance and unfounded (Complaint, para. 19).

9. Contrary to widespread misconception, the Act does not create or confer the right to organize or to strike. Those rights existed at common law. The fact is that the Act's peaceful election machinery is designed to obviate the necessity for the use of strikes to compel union recognition, by substituting the ballot box for the picket line.

10. Sound relations between plaintiff and its foremen are dependent on both plaintiff and its employees knowing what the situation actually is. The basic important fact, and one which as yet has not been determined, is whether or not a majority of the foremen do or do not wish to be repre-

sented by the union. That question can only be answered peacefully by an election by secret ballot conducted by the Board.

11. Such an election cannot but clarify the situation. If the union is not designated by a majority of the voters, that is the end of the matter. If it is designated, then the Board will certify that fact. It cannot be seriously contended that substitution of knowledge arrived at by peaceable means, in place of doubt, "destroys the harmonious relations between plaintiff and its supervisory employees."

12. Indeed the peaceful election process furnishes the best guarantee of the continuance of harmonious relations. If, in fact, a majority of the foremen do wish to be represented by the union but are blocked by plaintiff from an opportunity to cast ballots to demonstrate that fact, then the only means left to the foremen of demonstrating that fact to the reluctant plaintiff is the use of economic pressure. And as we know from experience the economic weapon most likely to be adopted in situations where an employer withholds union recognition, is the strike. That [fol. 47] is the very danger which the Legislature recognized and sought to avoid when it enacted Article 20 of the Labor Law. Experience has amply demonstrated the wisdom of the enactment.

Irreparable Injury

13. Plaintiff's assertion that it will suffer irreparable injury if this election is held is similarly without substance (Complaint, para. 20).

14. As I have pointed out if the union is not chosen in the election, that is the end of the matter. If, on the other hand, the union is chosen, the Board certifies that fact. No order is made directing the plaintiff to take or refrain from taking any action. Plaintiff, however, would be under the duty to deal in good faith with the union as to the wages, hours and working conditions of the foremen (Act. Sec. 705). That, on elementary principles, does not constitute damage or injury.

15. If, thereafter, the Board should issue a complaint alleging that plaintiff had failed to meet its statutory duty

to deal in good faith, the fact that plaintiff has the right to interpose an answer to such a complaint and appear at hearings on the issues thus defined, offer evidence, examine and cross-examine witnesses and receive full opportunity to be heard, does not constitute damage or injury. It has long been well settled that the necessity of defending an administrative proceeding does not constitute damage or injury.

16. Even if the Board ultimately issues an order directing plaintiff to deal with the union, that order would not be self-enforcing. Before plaintiff could be compelled to obey the Board's order, the Board would have to apply to this Court under Section 707 of the Act for an order of Court directing plaintiff to obey the Board's order. Plaintiff could oppose the Board's application or could itself apply to this Court for an order vacating the Board's order. *The propriety of the Board's direction of election which plaintiff now attacks, as well as of any future Board* [fol. 48] *order directing the plaintiff to deal with the union, would then be presented directly to this Court for review on the complete record of proceedings before the Board including the proceedings to date. That review would by statute bring up for determination all the issues which plaintiff seeks to raise in this action.* It is well settled, moreover, that the method of review which I have just outlined is the exclusive method of review of Board action provided by law. Clearly then no legally cognizable damage can possibly result to plaintiff by the holding of an election.

Conclusion

17. I believe that this action is wholly without merit, I respectfully submit that an order should be made pursuant to Rule 113 of the Rules of Civil Practice dismissing the complaint and directing that judgment to that effect be entered in favor of the defendants.

H. Myron Lewis.

Sworn to before me this 31st day of May, 1944. Helen S. Hoffer, Commissioner of Deeds, New York City, N. Y. Co. Clks. No. 15; Reg. No. 5H16 Kings Co. Clks. No. 3; Reg. No. 5H13. Commission expires 1/19/45.

[fol. 49] EXHIBIT "A"

National Labor Relations Board

Third Region Genesee Building Buffalo, New York

February 22, 1944

Ernest E. Cavagnaro, Regional Attorney, New York State Labor Relations Board, Western Region, State Office Building, Buffalo 2, New York.

DEAR MR. CAVAGNARO:

This is in acknowledgment and reply to your letter dated February 21, 1944.

Our records reveal that the Foreman's Association of American, Allegheny Ludlum Steel Corporation Chapter No. 58 has made no request of this office nor has filed any petition seeking certification as bargaining representative for a unit consisting of foremen or any other supervisory employees employed by the Allegheny Ludlum Steel Corporation at its Dunkirk, New York plant.

Under present policy, as originally enunciated by the National Labor Relations Board in the Maryland Drydock Company cases R-5212 and R-5214, and elaborated upon in subsequent decisions our Board will not proceed to certify a labor organization as bargaining agent for a unit composed of, or including, foremen, assistant foremen, and supervisory employees with authority to hire, promote, discharge, discipline, or otherwise effect changes in the status of employees, or effectively recommend such action. The Board has made two exceptions to this policy with respect to supervisory employees in the maritime and printing trades.

Therefore, in view of the above, it is my opinion that in the event the Foreman's Association of America had filed a petition seeking certification for foremen as a separate bargaining unit, in light of present Board policy, this office would have refused to issue notice of hearing. In other words, the petition would have been dismissed.

Very truly yours,

(Signed) M. S. Ryder, Regional Director.

MSR/c

[fol. 50] IN SUPREME COURT OF NEW YORK, CHAUTAUQUA COUNTY

[Title omitted]

AFFIDAVIT OF ERNEST E. CAVAGNARO

State of New York,
County of Erie,
City of Buffalo, ss:

Ernest E. Cavagnaro, being duly sworn, deposes and says: That he resides at 107 Capen Blvd., in the City of Buffalo, Erie County, New York.

That he is the Regional Attorney for the New York State Labor Relations Board in charge of the Western Regional Office, located in the State Office Building in the City of Buffalo, Erie County, New York.

That the Dunkirk plant of the Allegheny Ludlum Steel Corporation is situate in the Third Region of the National Labor Relations Board.

That on May 31, 1944, the deponent examined the records of the National Labor Relations Board at its Regional Office for the Third Region, 714 Genesee Building in the City of Buffalo, Erie County, New York, and at that time talked with Peter J. Crotty, Regional Attorney for said Board, who was then in charge of the said Regional Office.

That the deponent states no petition for investigation and certification of representatives for collective bargaining purposes of foremen, shift foremen, general foremen or general shift foremen, employed by the Allegheny Ludlum Steel Corporation at its Dunkirk, New York, plant, has been filed or is pending with the National Labor Relations Board.

[fol. 51] Ernest E. Cavagnaro.

Sworn to before me this 31st day of May, 1944.
Rita A. Kenney, Commissioner of Deeds, Buffalo, New York.

Endorsed Personal Service of the within affidavit and Notice of Motion is hereby admitted this 2nd day of June, 1944.

Moot, Sprague, Marcy & Gulick, Attorneys for Plaintiff.

[fol. 52] IN SUPREME COURT OF NEW YORK, COUNTY OF CHAUTAUQUA

[Title omitted]

AFFIDAVIT OF STANLEY A. MCCASKEY, JR.—Filed October 3, 1944

State of New York,
County of Erie,
City of Buffalo, ss:

Stanley A. McCaskey, Jr., being duly sworn, deposes and says:

That I am an officer, to wit, Assistant Secretary of The Allegheny Ludlum Steel Corporation, a Pennsylvania corporation duly licensed to do business in New York, and the plaintiff in this action.

1. This affidavit is respectfully submitted in opposition of the motion of defendants pursuant to Rule 113 of the Rules of Civil Practice for summary judgment dismissing the complaint.

2. In a proceeding entitled "In the Matter of The Allegheny Ludlum Steel Corporation—and—Foremen's Association of America, Allegheny Ludlum Steel Corporation Chapter No. 58," Case No. WE 373 on the records of the Board, in which proceeding plaintiff was named as a party and has appeared specially, the State Labor Relations Board, hereinafter called the State Board, issued and served its decision and direction of election which has been annexed to and made a part of the State's amended answer herein.

2a. Upon information and belief, that thereafter and on or about June 21, 1944, pursuant to said direction of election an election was held to determine whether the foremen at plaintiff's Howard Avenue and Brigham Road plants in Dunkirk, New York desired to be represented by Foremen's Association of America, Allegheny Ludlum Steel Corpora-
[fol. 53] tion Chapter No. 58 for the purpose of collective bargaining.

3. That following such election Ernest E. Cavagnaro, Esq., Regional Attorney for the State Board, found that the majority of eligible foremen who voted in said election chose the said Union to be their representative.

4. That deponent is informed by attorneys for plaintiff, and believes, that if the aforementioned proceedings before the said State Board are valid and within the power of the said State Board plaintiff will be guilty of unfair labor practices if it refuses to bargain in good faith with said Union or to discuss the grievances of the foremen with the Union representative.

5. That this action was commenced by the service of a summons and verified complaint on April 14, 1944 demanding, among other relief, that the court declare that the State Labor Relations Board has no jurisdiction to determine the bargaining representative of plaintiff's said foremen. That a verified amended answer was served on May 24, 1944.

Jurisdiction

6. That The Allegheny Ludlum Steel Corporation is a nationwide organization doing a large volume of business in interstate commerce. That the State Labor Relations Board in its said decision, referring to paragraph 2 hereof found as follows:

> "About 95%, by value, of the products produced at the Dunkirk plant are shipped to points outside of New York State. About 86%, by value, of the raw materials used at the Dunkirk plant are brought from points outside New York State. About 85%, by value, of partially fabricated materials are brought to the Dunkirk plant from points outside New York State for further fabrication. The Union concedes that the Company is engaged in interstate commerce."

7. That the rank and file employees of the said Dunkirk plants of the plaintiff are represented by the Steel Workers Organizing Committee, C. I. O., which has been certified as the bargaining representative for the said employees following a proceeding entitled "Matter of Allegheny Ludlum [fol. 54] Steel Corporation and Steel Workers Organizing Committee, Case No. III-R-411 before the National Labor Relations Board. That the said Steel Workers Organizing Committee, C. I. O. is a part of a national labor organization.

8. That deponent is informed by plaintiff's attorneys and believes that the National Labor Relations Board has

made determinations in various cases duly presented for its determination that foremen such as the members of Allegheny Ludlum Chapter No. 58, Foremen's Association of America, are employees within the meaning of the National Labor Relations Act and are entitled to protection of the National Labor Relations Board as such employees.

NLRB v. Skinner and Kennedy Stationary Company, 113 F2d 667.

Soss Manufacturing Company and Foremen's Association of America, NLRB case No. 7-C-1148.

Republic Steel Corporation .98 Inch Strip Mill and Foremen's Association of America, Case No. 8-C-1569.

NLRB v. Richter's Bakery, 140 F 2d 870.

That the NLRB has in the last mentioned cases made orders protecting the rights of the foremen.

9. That the NLRB has nevertheless determined that a bargaining unit consisting of foremen is not an appropriate unit for collective bargaining and that it has in many cases decided that the policies and purposes of the National Labor Relations Act will not be furthered by the holding of elections to certify representatives for bargaining from such units.

Maryland Drydock Company cases 49 NLRB 733.

Murray Corporation of America (Ecorse Plant) and Murray Ecorse Supervisors Association, Case No. R-4731.

General Motors Corp., Detroit Diesel Engine Division, 51 NLRB #89, Jy. 20, 1943 Case #R 5289.

10. That in the Maryland Drydock cases petitions were filed by a foremen's union and were entertained by the National Board and after hearings upon said petitions the said Board refused to hold an election as requested in the hearing. That in subsequent cases similar hearings have been held and that in a few instances where existing custom [fol. 55] in the industry accorded, elections have been held in accordance with the petitions. See for example:

Jones & Laughlin Steel Corp. 51 N. L. R. B. #187 Case #R 4882.

Now pending before the Board are at least four cases in which Foremen's Association of America has filed petitions. Those four cases are

Bohn Aluminum & Brass Company, Case No. 7-C-1264

Republic Steel Corp., Case No. 8-C-1569

Willis-Overland Motors, Case No. 8-C-1623

American Steel Foundry Indiana Harbor Works, 13-C-2294

11. That deponent is also informed that there is nothing in the decisions of the said Board which indicates that foremen are not entitled to and have not been accorded the protection of the NLRA, but that on the contrary such protection has in every case where it has been sought been accorded to foremen insofar as the National Board has felt it to be consistent with the welfare of rank and file employees. That deponent makes reference to the decisions of the National Labor Relations Board hitherto referred to and the other decisions of the said Board dealing with the subjects of foremen's unions. For a complete and informative history of the policy of the National Labor Relations Board with regard to foremen's unions and the representative of supervisory employees, deponent respectfully refers the court to an opinion of Jesse Freidin, General Counsel of the War Labor Board, which was reported in Volume 3 CCH Labor Service Paragraph 15119.

12. Upon information and belief, the foremen employed in the steel industry have not heretofore by custom been represented by unions nor belonged to unions. That they have been specifically denied membership in those unions to which rank and file employees are admitted.

13. That deponent is informed by plaintiff's attorneys and believes by reason of the foregoing facts the State [fol. 56] Labor Relations Board of the State of New York had exceeded its power in the premises.

Irreparable Injury to Plaintiff

14. That plaintiff's relations with foremen employed at its Dunkirk plant have heretofore been harmonious and that no labor disputes have existed heretofore between plaintiff and its said foremen.

15. The foremen employed in plaintiff's said plants play an important part in conducting plaintiff's relations with its rank and file workers. That it is a part of the duty of the foremen to attempt to settle worker grievances. When foremen are unable to settle grievances, their recommendations are invariably sought by their superiors and are by them accorded great weight in arriving at a solution of the grievances. The recommendations of the foremen are also of great importance in connection with discipline, discharge and promotion. The foremen are engaged solely in supervising the labor of their employees.

16. The actions of a foreman are in some instances the subject of a grievance of the union representing the rank and file.

17. Deponent from his experience with labor relations believes that the unionization of foremen will tend to increase labor disputes in plants for the following reasons, among others:

a. In cases of disputes between the rank and file union and management in which the action of a foreman is the subject of dispute, settlement can be far less expeditious and the danger of crippling strikes will be increased if a foremen's union is recognized.

b. The number of jurisdictional disputes will be increased.

c. The plaintiff will be subjected to the increased risk of committing through partisan action by its foremen, for which under the N. L. R. A. it is held responsible, unfair labor practices when competing unions are seeking recognition within plaintiff's said plants.

d. Management has always been united with the foremen by a community of interest and a similarity of function. Their common cause has resulted in benefit to the rank and file and to the public since it has tended to simplify the issues between labor and management and has made the fixing of responsibility a [fol. 57] simple matter. The unionization of foremen will tend to divorce them for management and to make it more difficult for rank and file employees to fix the

responsibility for unfair labor practices and to adjust them.

18. Deponent believes that the recognition accorded the foremen's union by the State Board has resulted in the activation of an organization whose continued existence is a danger to the peaceful and harmonious relations which have heretofore existed between management and labor at its Dunkirk plant and that continued recognition by the State Board can but make the situation worse if, as deponent is informed and believes, defendants have acted upon their power and jurisdiction in conducting the said proceedings and in conflict with the policy of the N. L. R. B.

19. Deponent is informed and believes that a delay of months in determining the question of jurisdiction herein raised will be inevitable if deponent is forced to rely on the alleged remedy provided by Section 707 of the Labor Law of the State of New York and that such delay alone will endanger plaintiff's labor relations, since plaintiff, to protect its position that is not subject to the State Board must refuse to bargain with the said Union until the question of jurisdiction has been decided.

20. Deponent is informed and believes that before a review can be obtained pursuant to Section 707 of the Labor Law plaintiff must endanger its relations with its foremen by committing an act which the State Board would regard as unfair labor practices.

21. Deponent is informed and believes that petitions regarding its relations with its employees at its said Dunkirk plants may at any time be filed with the National Labor Relations Board and that so long as the State Board continues to assert jurisdiction of this and like disputes that deponent runs the risk of being ordered to take action which is contrary to the order and policy of the National Board and may by it be regarded as an unfair labor practice and that this will further imperil plaintiff's relations not only with the foremen's union but with the [fol. 58] union representing the rank and file.

22. Deponent believes that by reason of the foregoing fact incalculable damage will be caused plaintiff for which by its very nature there can be no adequate remedy whatever only by the prompt determination in this action.

That the State Board may not act with reference to plaintiff's supervisory employees will plaintiff's rights be protected and further damage to the plaintiff be prevented.

Stanley A. McCaskey Jr.

Subscribed and sworn to before me this 27th day of June, 1944. William G. Conable, Notary Public, Erie Co., N. Y.

[fol. 59] In Supreme Court of New York, County of Chautauqua.

[Title Omitted]

Reply Affidavit of H. Myron Lewis—Filed October 3, 1944

State of New York,
City of New York,
County of New York, ss:

H. Myron Lewis, being duly sworn deposes and says:

I am a Member of the defendant New York State Labor Relations Board and respectfully submit this affidavit in reply to the affidavit of Stanley A. McCaskey, Jr., sworn to June 27, 1944.

As to paragraphs 6 through 13.

1. Paragraphs 6 through 13 of Mr. McCaskey's affidavit show that plaintiff is not questioning the jurisdiction of the defendant Board to act "at all" in the premises, i. e., to entertain the petition concerning representation of plaintiff's foremen at its Dunkirk plant. On the contrary the affidavit makes it clear that by this action plaintiff is really seeking prematurely to review the defendant Board's finding of fact that plaintiff's foremen at its Dunkirk plant constitute an appropriate bargaining unit.

2. The discussion of the decisions of the National Board in the affidavit is inaccurate. On the one hand the National Board has afforded foremen protection against discharge because of union membership but on the other hand it has, in the Maryland Drydock case, overruled prior decisions and refused to continue to grant foremen access to the National Board's *election machinery for bargaining purposes*. But it is the fact that neither the National

Board nor the National Act prohibits foremen from organ-[fol. 60] izing and bargaining through representatives of their own choosing or prohibits employers from bargaining with foremens' representatives. Bargaining between the plaintiff and the union which its foremen at its Dunkirk plant have chosen can violate no Federal statute, rule, regulation or order.

As to paragraphs 14 through 22

3. Paragraph 14 through 22 of Mr. McCaskey's affidavit do not set forth a single fact constituting damage. The arguments are wholly speculative and are contradicted by the long and well known history of bargaining by foremen and other supervisory employees. The arguments advanced are the traditional arguments used years ago against rank and file employees joining unions. The fact, as contrasted with plaintiff's speculative forebodings, is that the defendant Board has certified bargaining units of foremen and supervisory employees ever since 1938. In not a single instance have consequences such as those plaintiff prophesies, resulted.

4. The situation at bar is actually a simple one. The Foremen's Association of America is an independent labor organization admitting only foremen to membership. It is not affiliated or in any way connected with United Steel Workers of America, C. I. O., which represents the rank and file employees of plaintiff's Dunkirk plant. Nor is it affiliated with the C. I. O., A. F. of L. or with any other group, national or otherwise. The Board on June 21, 1944, conducted an election by secret ballot among plaintiff's foremen. The vote was 36 to 3 in favor of representation by the Foremen's Association. On June 30, 1944, the Board certified the Association as bargaining representative of plaintiff's foremen.

5. Chief Justice Taft long ago pointed out that unions "were organized out of the necessity of the situation. A single employee was helpless in dealing with an employer. • • • Union was essential to give labor its opportunity [fol. 61] to deal in equality with their employer." (*American Steel Foundries* v. *Tri-City C. T. Counsel*, 257 U. S. 184, 208-9). It is a fair inference therefore, in view of the results of the election conducted by the defendant

Board that plaintiff's foremen at the Dunkirk plant, have decided, rightly or wrongly, that they can better their situation by union representation. Plaintiff's suggestion that the defendant Board "unionizes" foremen is wholly gratuitous. Joining or not joining a union rests with the foremen themselves. All the Board does is conduct an election by secret ballot and certify the fact which the balloting discloses.

6. Plaintiff argues that the defendant Board's action "has resulted in the activation of an organization whose continued existence is a danger to the peaceful and harmonious relations which have heretofore existed * * *" Even apart from the realistic comment of Chief Justice Taft quoted above, how can plaintiff consistently argue that "peaceful and harmonious relations" will be disturbed by permitting plaintiff's foremen to have recourse to the peaceful machinery of the State Labor Relations Act, but that "peaceful and harmonious relations" will continue if, by denial of such recourse, the foremen are left no alternative but to strike to compel recognition by plaintiff of the Foremen's Association.

7. Plaintiff argues that it would "be subjected to the increased risk of committing through partisan action by its foremen, for which under the N. L. R. A. it is held responsible, unfair labor practices when competing unions are seeking recognition * * *" The settled law furnishes a complete answer to that misgiving. Plaintiff would not be chargeable for the conduct of foremen towards foremen. Plaintiff can be chargeable only for the conduct of foremen towards rank and file employees. And that was so long before its foremen joined the Association.

8. Again, plaintiff says that the number of "jurisdictional disputes" will be increased. The statement is wholly unparticularized and unexplained. To have meaning it [fol. 62] would have to relate to a situation in which there is a dispute as to whether a given employee is a foreman or a rank and file employee. But such disputes can exist at present for, as the affidavit points out in paragraph 12, foremen are not eligible for membership in the C. I. O. union which represents plaintiff's rank and file employees. Recognition by plaintiff of the Foremen's Association which admits only foremen to membership, could preclude the

possibility of such disputes developing into problems, for agreement could be reached on over-all classification of employees.

9. Nor can certification of the Foremen's Association affect bargaining between plaintiff and the C. I. O. union representing plaintiff's rank and file employees. The Foremen's Association has been certified only as the representative of the foremen and could bargain only for foremen. It could not bargain for the rank and file employees who are already represented by another union, in no way affiliated with the Foremen's Association.

10. I respectfully emphasize that even assuming arguendo that plaintiff's speculative fears are justified, *the things it fears, flow not from any action by the defendant Board, but from the fact that plaintiff's foremen have decided to join a union.* They result from "the necessities of the situation," as Chief Justice Taft pointed out, not from anything that the defendant Board does or can do. All the defendant Board has done is to make available the peaceful machinery which the Legislature established, machinery which the Courts repeatedly have recognized was established to obviate the necessity for the use of economic pressure by employees to compel union recognition. It is the plaintiff alone that can aggravate the situation. In the words of Chief Justice Hughes (*N. L. R. B. v. Jones & Laughlin Steel Corp.* 301 U. S. 1, 42):

> "Experience has abundantly demonstrated that the recognition of the right of employees to self-organization and to have representatives of their own choosing for the purpose of collective bargaining is often an essential condition of industrial peace. Refusal to confer and negotiate has been one of the most prolific cause of strife. This is such an outstanding fact in the history of labor disturbances that it is a proper [fol. 63] subject of judicial notice and requires no citation of instances."

11. Finally I should like to comment on paragraph 21 of Mr. McCaskey's affidavit. There it is said in substance that "petitions regarding plaintiff's relations with its employees" may be filed with the National Board and that because of the action of the defendant Board plaintiff "runs the risk of being ordered to take action which is contrary

to the order and policy of the National Board * * *."
If the "employees" is meant rank and file employees, the paragraph is meaningless on its face. If by "employees" is meant foremen, then the statement is both lacking in substance and wholly inaccurate. It is lacking in substance because of its utter improbability, as reference to the letter of the Buffalo Regional Director of the National Board, annexed to my affidavit dated May 31, 1944, will show. It is inaccurate because, if a petition relating to representation of plaintiff's foremen at its Dunkirk plant were filed with the National Board, that petition (assuming of course that the National Board continues to apply the *Maryland Drydock* decision) would be dismissed. No "order" directed to the plaintiffs would or could be made by the National Board, as the *Maryland Drydock* decision itself shows. More specifically, no order would or could be made forbidding the plaintiff to recognize or deal with the Foremen's Association. Indeed in the *Soss Manufacturing Company* case the National Board itself pointed out, that under its prior decision in the *Maryland Drydock* case, there is nothing unlawful in an employer recognizing and dealing with a union representing its supervisory employees.

12. I respectfully submit that the defendant Board should have judgment declaring that it had and has jurisdiction in the premises.

[fol. 64] H. Myron Lewis.

Sworn to before me this 19th day of July, 1944. William J. Peterson, Notary Public Queens Co. No. 1627; Queens Co., Reg. No. 57-P-6; N. Y. Co. Clk's No. 142; N. Y. Co. Reg. No. 85-P-6. Commission expires March 30, 1946.

[fol. 65] AFFIDAVIT OF SERVICE BY MAIL

State of New York,
City of New York,
County of New York, ss:

Hilda Reichsfeld, being duly sworn, deposes and says that she is a secretary in the office of the attorney for the above named Defendants herein. That on the 19th day of July, 1944 she served Reply Affidavit of H. Myron Lewis sworn

to July 19, 1944 upon Moot, Sprague, Marcy & Gulick, Esqs., the attorneys for the Plaintiff by depositing a true copy of the same securely enclosed in a post-paid wrapper in a Post-Office Box regularly maintained by the United States Government at 250 West 57th Street in said County of New York directed to said attorneys for the Plaintiff, at No. 302 Erie County Savings Bank Building, Buffalo, N. Y., that being the address within the State designated by them for that purpose upon the preceding papers in this action as the place where they then kept an office, between which places there then was and now is a regular communication by mail.

Deponent is over the age of 21 years.

Hilda Reichsfeld.

Sworn to before me this 19th day of July, 1944. William J. Peterson, Notary Public, Queens Co. No. 1627, Queens Co. Reg. No. 57-P-6, N. Y. Co. Clk's No. 142, N. Y. Co. Reg. No. 85-P-6. Commission Expires Mar, 30, 1946.

[fol. 65a] In Supreme Court of New York, County of Chautauqua

Stipulation

[Same Title.]

It Is Hereby Stipulated that The Allegheny Ludlum Steel Corporation employs more than 12,000 employees in all its plants throughout this country.

The C. I. O. was certified by the National Labor Relations Board on June 29, 1942 as collective bargaining representative of plaintiff's employees, other than foremen, employed at plaintiff's five plants including plants at Brackenridge and West Leechburg, Pennsylvania and Dunkirk, New York, and a single contract was then made on September 10, 1942 covering plaintiff's employees, other than foremen, at said plants.

[fol. 65b] It Is Further Stipulated that the Court may in considering this case refer to and take cognizance of any and all decisions of the National Labor Relations Board and the State Labor Relations Board.

Moot, Sprague, Marcy & Gulick, Attorneys for Plaintiff; William E. Grady, Jr., Attorney for Defendants.

[fol. 66] In Supreme Court of New York, Chautauqua County

The Allegheny Ludlum Steel Corporation

against

William J. Kelley and Myron Lewis, Constituting the State Labor Relations Board of the State of New York

Appearances:

Moot, Sprague, Marcy & Gulick, Esqs., Attorneys for Plaintiff, Welles V. Moot, Esq., William H. Eckert, Esq., and William G. Conable, Esq., of Counsel.

William E. Grady, Jr., Esq., Attorney for Defendants, Philip Feldbloom, Esq., and Norbert M. Phillips, Esq., of Counsel.

Opinion—Filed July 28, 1944

Hinkley, J.

This decision, by agreement of counsel, is not only determinative of defendants' motion to dismiss the complaint under Rules 112 and 113 of the General Rules of Practice but also of the trial of the Equity action itself. There are no disputed questions of fact but only questions of law.

Plaintiff, a Pennsylvania corporation licensed to do business in the State of New York and operating plants in various other states, seeks a declaratory judgment to restrain and enjoin the defendants as the State Labor Relations Board of the State of New York from taking steps to determine a representative of plaintiff's supervisory employees to bargain collectively with plaintiff. Prior to the bringing of the action and on December 30th, 1943, a union of national scope, known as Foreman's Association of America, Allegheny Ludlum Steel Corporation Chapter No. 58, filed with defendants a petition seeking an investigation by defendants by virtue of Article 20 of the State Labor Law and further asking that the Union be certified [fol. 67] as the collective bargaining agent or representative of the foremen or supervisors of plaintiff's Dunkirk plant. This must not be confused with the certification by the National Labor Relations Board of the C. I. O. as bargaining agent or representative of the so-called rank and file of plaintiff's employees in the Dunkirk plant. The defendants proceeded with such investigation and while so act-

ing this action was brought. Since the trial of the case an election has been held and a majority of eligible foremen who voted in that election chose the said Foreman's Union Chapter 58 to be their bargaining agent or representative for the purpose of collective bargaining.

Plaintiff contends that the defendants are without jurisdiction to act in the matter. This contention is based upon the fact that the plaintiff is engaged in interstate commerce and that the jurisdiction rests exclusively with the National Labor Relations Board by virtue of the National Labor Relations Act. (49 Stat. 449, U. S. Code, Title 29, Chapter 7, U. S. C. A. 151.) Plaintiff also contends that if the defendants have jurisdiction under ordinary circumstances that they are not authorized to receive and act upon the petition of the said Foreman's Union because of a definite policy adopted by the National Labor Relations Board decreeing that a unit composed entirely, as this one is, of foremen or those occupying a supervisory position with the Company is not an appropriate unit for collective bargaining.

Defendants contend that they are vested with jurisdiction; that they were required to act; that they are not controlled by any policy of The National Labor Relations Board; and that the Union in question is an appropriate bargaining agent for collective bargaining.

This decision would be easily arrived at were it settled by judicial decisions that The National Labor Relations Board, whether acting or not, covered the whole field of [fol. 68] employer and employee relations in industries engaged in interstate commerce. For this plaintiff is almost exclusively engaged in interstate commerce and it cannot be said by any stretch of the imagination that it is subject to the minimus rule. On the contrary, the law is well settled that defendants have jurisdiction to act when their acts do not conflict with those of The National Labor Relations Board or in the event that the latter Board has taken no steps to accept jurisdiction. (Matter of Davega vs. City Radio, etc., 281 N. Y. 13.), or unless the intention of Congress is clearly expressed that the Federal Board shall cover the entire field.

Although The National Labor Relations Board has assumed jurisdiction to certify a representative for collective bargaining between plaintiff and the rank and file of plain-

tiff's employees in the Dunkirk plant, the National Board has never been petitioned by the Foreman's Union involved herein, nor by any other similar union or group, asking to be designated as bargaining agent or representative of the plaintiff's Dunkirk plant. Nor has The National Labor Relations Board done any act in relation to collective bargaining by the foremen or supervisors of that plant.

This brings us to the narrow question as to whether the adoption by The National Labor Relations Board of a definite policy to refuse to recognize foremen unions or groups as appropriate bargaining units in controlling upon defendants. This is not, as defendants' counsel contend, the determination by The National Labor Relations Board or the defendants of a question of fact in each individual case. It is a definite policy, broad in its scope, and based upon the definite conclusion of the National Board that such type of unions or groups are not appropriate bargaining agents and should not be recognized.

If such policy is controlling upon defendants then it ousts them of any jurisdiction to act in this or any similar case. [fol. 69] The Court, at this time, as defendants' counsel contend, is not in a position to review the action of defendants in their administrative capacity. Plaintiff must stand or fall upon its claim that, by reason of a declared policy of a superior board, the defendants are without jurisdiction to act in this case. If defendants are without jurisdiction to act, then there is ample authority for a declaratory judgment. (Section 473, C. P. A. Dun & Bradstreet, Inc. vs. City of New York, 276 N. Y., 198. Bank of Yorktown vs. N. Y. S. L. R. B., 280 N. Y, 673.)

That there is a sharp conflict between the policy of The National Labor Relations Board and that of the defendants is most clear. The view taken by The National Labor Relations Board that it will not lend itself to collective bargaining by foremen unions or groups is clearly shown by its language in the Maryland Drydock cases (49 N. L. R. B., 733) and other of its decisions and in the letter of the regional director attached to defendants' moving papers. That the defendants take the opposite view and feel in duty bound to aid foremen unions or groups in collective bargaining is shown by their decision No. 2751 in this case, which decision is attached to defendants' answer.

The Court is not called upon nor does it desire to express its opinion of the logic or reasoning or right or wrong of the conflict of policy of the Federal and State Labor Relations Boards. In the absence of a definite intent of statutory regulation and in the further absence of judicial precedent, the Court cannot properly decree that in this instance the defendants are without jurisdiction to act simply because The National Labor Relations Board would not act under similar circumstances. Nor can the plaintiff arbitrarily refuse to recognize the State Labor Relations Board because it disagrees with the policy of that Board. Under the circumstances of this case, the plain-
[fol. 70] tiff is called upon to co-operate to the fullest extent with the New York State Labor Relations Board and the certified representative of the foreman group or union until such time, if it arises, that the defendants are ousted from jurisdiction by The National Labor Relations Board.

The Court cannot read into the legislation upon labor relations any intent upon the part of Congress to cover the whole field of employer and employee relations in industrial plants engaged in interstate commerce by the act of Congress in creating The National Labor Relations Board. If so, then state action would be precluded. (Napier vs. Atlantic Coast Line, 272 U. S., 605, at 613; Oregon-Washington R. & N. Co. vs. Washington, 270 U. S., 87) Congress cannot be held to have intended to supercede or suspend the exercise of reserved powers of a State, even when that may be done, unless and except so far as its purpose to do so is clearly manifested. (Illinois Central R. Co. vs. Public Utilities Com., 245 U. S., 493, 510. Approved in Welch Co. vs. New Hampshire, 306 U. S., 79, 85.)

Here we have, in the language of Chief Justice Stone (Cloverleaf vs. Patterson, 315 U. S., 148 at 170 dissenting opinion) an unexercised discretionary power given by Congress to a Federal Board as a means of regulating interstate commerce, when the full exercise of its authority would conflict with an assertion of the State power. But only in a case where the intention of Congress to give to the Federal Board exclusive control over the entire field is clearly manifested can the power of the State to act be superceded. (N. W. Bell Tel. Co. vs. Ry. Commission, 297 U. S., 471.) In the absence of such clear intention, it can-

not be said that the failure of the Federal Board to exercise its full power is in effect a controlling administrative ruling that no further regulation by either Federal or State government is proper or needful.

It follows that defendants' motion to dismiss the plaintiff's complaint under Rules 112 and 113 must be granted [fol. 71] and judgment entered in favor of defendants dismissing plaintiff's complaint upon the merits and not as matter of discretion.

Order and judgment may be entered in accordance with this decision, with opportunity to counsel to file requests to find and conclusions of law, if such intention is indicated within a reasonable time.

Alonzo G. Hinkley, Justice, Supreme Court.

July 27th, 1944.

[fol. 72] In Supreme Court of New York, Chautauqua County

[Title omitted]

Notice of Appeal—Filed June 7, 1945

Please Take Notice, that pursuant to the provisions of Subdivision 1 of Section 588 of the Civil Practice Act, the above-named plaintiff, Allegheny Ludlum Steel Corporation, relying upon questions herein raised involving the construction of the Constitution of the United States of America, hereby appeals as of right to the Court of Appeals of the State of New York from the final judgment herein dated the 28th day of May, 1945, and filed and entered on that day in the office of the Clerk of Chautauqua County pursuant to the order of affirmance of the Appellate Division of the Supreme Court, Fourth Judicial Department, dated the 1st day of May, 1945, filed and entered in the office of the Clerk of the Appellate Division of the Supreme Court, Fourth Judicial Department on the 2nd day of May, 1945, which said judgment adjudges that the order made by Mr. Justice Hinkley on October 3, 1944, dismissing the complaint on the merits and the judgment entered herein on October 4, 1944 dismissing said complaint upon the merits with costs, be affirmed with costs in the

amount of $140.78, and from each and every part of the said judgment and from the whole thereof.

Dated: Buffalo, New York, June 6th, 1945.

Moot, Sprague, Marcy & Gulick, Attorneys for Plaintiff, Office and P. O. Address, 302 Erie County Bank Bldg., Buffalo 2, New York.

To. William E. Grady, Jr., Attorney for Defendants, Office and P. O. Address, 250 West 57th Street, Borough of Manhattan, City of New York; Clerk of the County of [fol. 73] Chautauqua, Mayville, New York.

[File endorsement omitted.]

[fol. 74] In Supreme Court of New York, County of Chautauqua

The Allegheny Ludlum Steel Corporation, Plaintiff,

against

William J. Kelley and H. Myron Lewis, constituting the State Labor Relations Board of the State of New York, Defendants.

Judgment—Entered May 28, 1945

Plaintiff having appealed to the Appellate Division of the Supreme Court, Fourth Judicial Department, from an order duly made herein by Mr. Justice Hinkley, duly entered in the office of the Clerk of this Court on October 3rd, 1944, and from a judgment duly entered thereon in the office of the Clerk of this Court on October 3rd, 1944, dismissing the complaint herein,

And, said appeal having been duly heard by the said Appellate Division, and the said Appellate Division having in the term commencing the 1st day of May, 1945, duly ordered unanimously that the said order and judgment, so appealed from, be affirmed with costs to the defendants,

Now, on motion of William E. Grady, Jr., Esq., attorney for the defendants, it is

Adjudged, that the order made by Mr. Justice Hinkley and the judgment entered thereon, so appealed from, be,

and the same hereby are, in all things affirmed; and it is further

Adjudged, that the defendants, William J. Kelley and H. Myron Lewis, constituting the State Labor Relations Board of the State of New York, of 250 West 57th Street, Borough of Manhattan 19, City and State of New York, recover of the plaintiff, The Alleghany Ludlum Steel Corporation, of Dunkirk, New York, its costs, amounting to the sum of $140.78, as taxed, and that the defendants have execution therefor.

[fol. 75] Entered this 28th day of May, 1945, at 2 P. M.
C. E. Goodrich, Clerk.

[fol. 76] In Supreme Court of New York, Appellate Division

At a term of the Appellate Division of the Supreme Court of the State of New York, in and for the Fourth Judicial Department, at the City of Rochester, N. Y., commencing on the 1st day of May, 1945.

Present: Hon. Marsh N. Taylor, Presiding Justice; Hon. William P. Dowling, Hon. Francis D. McCurn, Hon. George A. Larkin, Hon. William F. Love, Associate Justices.

The Allegheny Ludlum Steel Corporation, Appellant,

vs.

William J. Kelley and H. Myron Lewis, constituting the State Labor Relations Board of the State of New York, Respondents.

Order of Affirmance

The above named The Allegheny Ludlum Steel Corporation, plaintiff in this action, having appealed to the Appellate Division of the Supreme Court, Fourth Department, from a judgment of the Supreme Court, entered in the office of the Clerk of the County of Chautauqua, on the 3rd day of October, 1944, and from an order entered in said Clerk's office on the same day, and the said appeal having been argued by Mr. Welles V. Moot, of counsel for the appellant, and by Mr. William E. Grady, Jr., of coun-

sel for the respondents, and due deliberation having been had thereon

It is hereby Ordered, That the judgment and order so appealed from be, and the same hereby are, affirmed with costs.

All concur.

Enter, Marsh N. Taylor.

Entered 2nd day of May, 1945.

Herbert E. Wait, Clerk.

[fol. 77] SUPREME COURT, APPELLATE DIVISION, FOURTH JUDICIAL DEPARTMENT

Clerk's Office, Rochester, N. Y.

I, Herbert E. Wait, Clerk of the Appellate Division of the Supreme Court in the Fourth Judicial Department, do hereby certify that the within is a true copy of the original order made by said court upon the appeal in the within entitled action or proceeding, and of the whole thereof, and that the original case and papers upon which said appeal was heard are hereunto annexed.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said Court at the City of Rochester, New York, this 2nd day of May, 1945.

Herbert E. Wait, Clerk. (Seal.)

[fol. 77a] IN COURT OF APPEALS OF NEW YORK

STATE OF NEW YORK, ss:

Pleas in the Court of Appeals, held at Court of Appeals Hall, in the City of Albany, on the 29th day of November in the year of our Lord one thousand nine hundred and forty-five, before the Judges of said Court.

Witness, The Hon. John T. Loughran, Chief Judge, Presiding. John Ludden, Clerk.

REMITTITUR—November 30, 1945

THE ALLEGHENY LUDLUM STEEL CORPORATION, Appellant,

ag'st

WILLIAM J. KELLEY & ANO., &c., State Labor Relations Board of the State of New York, Respondents

Be It Remembered, That on the 28th day of August in the year of our Lord one thousand nine hundred and forty-five, The Allegheny Ludlum Steel Corporation, the appellant in this cause, came here unto the Court of Appeals, by Moot, Sprague, Marcy & Gulick, its attorneys, and filed in the said Court a Notice of Appeal and return thereto from the judgment of the Appellate Division of the Supreme Court in and for the Fourth Judicial Department.

And William J. Kelley and another, &c., State Labor Relations Board of the State of New York, the respondents in said cause, afterwards appeared in said Court of Appeals by William E. Grady, Jr., their attorney.

Which said Notice of Appeal and the return thereto, filed as aforesaid, are hereunto annexed.

Whereupon, The said Court of Appeals having heard this cause argued by Mr. Welles V. Moot, of Counsel for the appellant, and by Mr. William E. Grady, Jr. of counsel for the respondents, and after due deliberation had thereon, [fol. 77b] did order and adjudge that the Judgment of the Appellate Division of the Supreme Court appealed from herein be and the same hereby is affirmed, with costs.

And it was also further ordered, that the records aforesaid, and the proceedings in this Court, be remitted to the said Supreme Court, there to be proceeded upon according to law.

Therefore, it is considered that the said Judgment be affirmed, with costs, as aforesaid.

And hereupon, as well the Notice of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said Court of Appeals remitted into the Supreme Court of the State of New York before the Justices thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said Supreme Court, before the Justices thereof, &c.

John Ludden, Clerk of the Court of Appeals of the State of New York.

COURT OF APPEALS, Clerk's Office,
Albany, November 30, 1945.

I Hereby Certify, that the preceding record contains a correct transcript of the proceedings in said cause in the Court of Appeals, with the papers originally filed therein, attached thereto.

John Ludden, Clerk. (Seal.)

[fol. 78] IN SUPREME COURT OF NEW YORK, COUNTY OF CHAUTAUQUA

Present Hon. Parton Swift, Justice

THE ALLEGHENY LUDLUM STEEL CORPORATION, Plaintiff,

against

WILLIAM J. KELLEY and H. MYRON LEWIS, constituting the State Labor Relations Board of the State of New York, Defendants.

ORDER ON REMITTITUR—December 26, 1945

Plaintiff having appealed to the Appellate Division of the Supreme Court, Fourth Judicial Department from an order duly made herein by Mr. Justice Hinkley, duly entered in the office of the Clerk of this Court on October 3, 1944, and from a judgment duly entered thereon in the office of the Clerk of this Court on October 3, 1944, dismissing the complaint herein, and said appeal having been duly heard by the said Appellate Division, and the said

Appellate Division having in the term commencing on the 1st day of May, 1945, duly ordered unanimously that the said order and judgment so appealed from, be affirmed with costs to the defendants, and a judgment having on the 28th day of May, 1945, been duly entered in the office of the Clerk of this Court upon the said order and remittitur of the said Appellate Division, and the plaintiff having appealed to the Court of Appeals from the said order of the Appellate Division and the judgment entered thereon, and the said appeal having been duly argued at the said Court of Appeals and the said Court of Appeals after due deliberation having ordered and adjudged that the said judgment of the Appellate Division, so appealed from, be affirmed [fol. 79] with costs and having ordered and adjudged that the proceedings therein be remitted to this Court to be proceeded upon according to law.

Now, on reading and filing the remittitur from the said Court of Appeals of the State of New York, dated November 30, 1945, and upon motion of William E. Grady, Jr., Esquire, attorney for the defendants herein, it is hereby

Ordered, that the aforesaid order and judgment of the Court of Appeals, be, and the same hereby is, made *and* the order and judgment of this Court.

Enter in Chautauqua County.

Parton Swift, J. S. C.

Erie Special Term, 12-26-45. Granted and Ordered. Entered in Chautauqua County Clerk's Office.

G. V. Laughlin, Sp. Dep. Co. Clerk.

[fol. 80] In Supreme Court of New York, Chautauqua County

The Allegheny Ludlum Steel Corporation, Plaintiff,

against

William J. Kelley and H. Myron Lewis, constituting the State Labor Relations Board of the State of New York, Defendants.

Judgment on Remittitur—Entered December 28, 1945

Plaintiff having appealed to the Appellate Division of the Supreme Court, Fourth Judicial Department, from an order duly made herein by Mr. Justice Hinkley, duly

entered in the office of the Clerk of this Court on October 3rd, 1944, and from a judgment duly entered thereon in the office of the Clerk of this Court on October 3rd, 1944, dismissing the complaint herein,

and, said appeal having been duly heard by the said Appellate Division, and the said Appellate Division having in the term commencing the 1st day of May, 1945, duly ordered unanimously that the said order and judgment, so appealed from, be affirmed with costs to the defendants, and the defendants having on the 28th day of May, 1945, entered judgment upon the order and remittitur of the said Appellate Division,

and, the plaintiff having appealed to the Court of Appeals from the said order of the Appellate Division and the judgment entered thereon, and the said appeal having been duly argued before the Court of Appeals, and after due deliberation the Court of Appeals by its order and remittitur dated November 30, 1945, having duly ordered and adjudged that the said order of the said Appellate Division of the Supreme Court and the judgment entered thereon, so appealed from, be affirmed with costs, and the said Court of Appeals having further ordered that the record and proceedings therein be remitted to this Court, here to be proceeded upon [fol. 81] according to law,

and, this Court having by its order duly made herein on the 26 day of December, 1945 and duly entered in the office of the Clerk of this Court on the 27 day of December, 1945, duly ordered that the aforesaid order and judgment of the Court of Appeals be, and it thereby was, made the order and judgment of this Court,

now, on motion of William E. Grady, Jr., Esq., attorney for the defendants, it is hereby

adjudged, that the aforesaid order of the Appellate Division and the judgment entered thereon, so appealed from, be, and the same hereby are, in all things affirmed; and it is further

adjudged, that the defendants, William J. Kelley and H. Myron Lewis, constituting the State Labor Relations Board of the State of New York, of 250 West 57th Street, Borough of Manhattan 19, City and State of New York, recover of the plaintiff, The Allegheny Ludlum Steel

Corporation, of Dunkirk, New York, its costs, amounting to the sum of $170.00 as taxed, and that the defendants have execution therefor.

Entered this 28 day of December, 1945, at 10.55 A. M.
Clark E. Goodrich, Clerk.

[fol. 82] IN SUPREME COURT OF THE UNITED STATES

[Title omitted]

PETITION FOR APPEAL FROM THE SUPREME COURT OF THE STATE OF NEW YORK, CHAUTAUQUA COUNTY, TO THE SUPREME COURT OF THE UNITED STATES—Filed March 5, 1946.

To the Chief Judge of the Court of Appeals of the State of New York:

The Allegheny Ludlum Steel Corporation, your petitioner, respectfully shows:

1. Petitioner is the appellant in the above entitled cause.

2. Petitioner served a complaint on the appellees in the Supreme Court of the State of New York for the County of Chautauqua on April 14, 1944, praying for a declaratory judgment (inter alia) that the above named appellees, constituting the New York State Labor Relations Board, had no jurisdiction over petitioner or over the supervisory employees of the petitioner at its plant at Dunkirk, New York; that the said Board might not properly certify the Foremen's Association of America, Allegheny Ludlum Steel Corporation Chapter 58, as the appropriate collective bargaining unit for the foremen or other supervisory employees of petitioner at its said plant; that the New York State Labor Relations Board had no jurisdiction to hold an election for the purpose of determining a representative of said supervisory employees to bargain collectively with any such representative; and that the said Board be restrained and enjoined from holding or attempting to hold an election for the said purpose or from taking any other action in connection with petitioner or its employees under the provisions of the New York State Labor Relations Act (Labor Law, Article 20, L. 1937, c. 443, §1, as amended,

[fol. 83] 30 McKinney's Consolidated Laws, §§700-716, effective May 20, 1937). On October 3, 1944, an order was entered at a special term of the said court granting appellees' motion for judgment on the pleadings and motion for summary judgment and directing that judgment be entered in favor of appellees and against petitioner, dismissing the complaint on the merits and not as a matter of discretion, and judgment was entered accordingly.

3. On appeal from the said judgment to the Appellate Division, Fourth Department, of the Supreme Court of the State of New York, the judgment was unanimously affirmed on the merits by the said Appellate Division by an order dated May 1, 1945, and judgment of affirmance pursuant to the said order was entered in the office of the Clerk of Chautauqua County.

4. An appeal from the said judgment of affirmance to the Court of Appeals of the State of New York, being the highest court of the said State in which a decision in the suit could be had, was taken as of right, pursuant to Article 38, §588, subdivision 1, of the Civil Practice Act, L. 1942, c. 297. The order of the Appellate Division affirming the judgment of the Supreme Court for Chautauqua County being unanimous, the appeal lay as of right only because there was directly involved the construction of the Constitution of the United States. The judgment was affirmed by the said Court of Appeals on November 30, 1945, and the record and proceedings in the cause were remitted into the Supreme Court of the State of New York. The order and judgment of the said Court of Appeals was made the order and judgment of the said Supreme Court by order of Mr. Justice Parton Swift on December 26, 1945, entered in the office of the Clerk of Chautauqua County on December 27, 1945. Judgment on the said order was entered by the Clerk of the said county on December 28, 1945.

5. In the said cause there was drawn in question the validity of a statute of the State of New York on the ground [fol. 84] of its being repugnant to the Constitution or laws of the United States and the decision was in favor of its validity, in that the Labor Law, Article 20, of the State of New York, L. 1937, c. 443, §1, as amended, 30 McKinney's Consolidated Laws §§700-716, effective May 20, 1937, was upheld as applied to the designation of a collective bargain-

ing unit and the holding of an election for the purpose of determining a representative for the supervisory employees of petitioner, which employees at all times herein relevant were engaged in interstate commerce. Petitioner respectfully represents that the said law of the State of New York as so applied is repugnant to the National Labor Relations Act, 49 Stat. 453, 29 U. S. C. §§151-166, approved July 5, 1935, and to Article I, Section 8, Clause 3, and Article VI, Clause 2, of the Constitution of the United States, in regulating commerce among the several States.

Wherefore petitioner prays for the allowance of an appeal from the said Supreme Court of the State of New York, Chautauqua County, from the judgment of the said court entered in the office of the Clerk of Chautauqua County on the 28th day of December, 1945, upon the order and judgment of the Court of Appeals of the State of New York dated November 20, 1945, which was adopted and became the order and judgment of the said Supreme Court by an order of Mr. Justice Parton Swift dated the 26th day of December, 1945, and entered in the office of the Clerk of Chautauqua County on the 27th day of December, 1945, to the Supreme Court of the United States, in order that the order and judgment of the Court of Appeals of the State of New York and the said judgment of the said Supreme Court of the State of New York entered thereon may be examined and reversed, and also prays that a transcript of the record, proceedings and papers in this case, duly authenticated by the Clerk of the Supreme Court of the State of New York, Chautauqua County, may be sent to the Supreme Court of the United States as provided by law.

The errors upon which your petitioner claims to be entitled to an appeal are more fully set out in the assign-
[fol. 55] ment of errors and prayer for reversal filed herewith. A statement of the basis upon which it is contended that the Supreme Court of the United States has jurisdiction upon appeal to review the judgment appealed from is also filed herewith.

Dated: 2/19/'46.

John G. Buchanan, Welles V. Moot, Attorneys for The Allegheny Ludlum Steel Corporation, Petitioner.

[fol. 86] IN SUPREME COURT OF THE UNITED STATES

[Title omitted]

ASSIGNMENT OF ERRORS AND PRAYER FOR REVERSAL—Filed March 5, 1946

The above named appellant assigns the following errors in the record and proceedings in the above entitled case:

1. The Court of Appeals of the State of New York erred in affirming the judgment dismissing the complaint upon the merits, for in so doing it held that the laws of the State of New York, and particularly the Labor Law, Article 20, L. 1937, c. 443, §1, as amended, 30 McKinney's Consolidated Laws, §§700-716, effective May 20, 1937, gave the appellees jurisdiction to decide the unit appropriate for the purposes of collective bargaining, to investigate a controversy concerning the representation of employees of the appellant, and to certify the name or names of the representatives designated or selected, though the said employees were engaged in interstate commerce and subject to the jurisdiction of the National Labor Relations Board under the provisions of the National Labor Relations Act, 49 Stat. 453, 29 U. S. C. §§151-166, approved July 5, 1935. The said Labor Law of New York as so applied is repugnant to Article I, Section 8, clause 3, and Article VI, clause 2, of the Constitution of the United States and to the said National Labor Relations Act, being a regulation of commerce among the several States in violation of a law of the United States regulating such commerce, which is the supreme law of the land.

[fol. 87] 2. The Court of Appeals of the State of New York erred in affirming the judgment dismissing the complaint upon the merits, for in so doing it held that the laws of the State of New York, and particularly the said Labor Law, gave the appellees jurisdiction to decide the unit appropriate for the purposes of collective bargaining, to investigate a controversy concerning the representation of employees of the appellant, and to certify the name or names of the representatives designated or selected, though the said employees were engaged in interstate commerce and subject to the jurisdiction of the National Labor

Relations Board, which under the provisions of the said National Labor Relations Act had already certified a representative for purposes of collective bargaining for other employees of the appellant at the same plant. The said Labor Law of New York as so applied is repugnant to Article I, Section 8, clause 3, and Article VI, clause 2, of the Constitution of the United States and to the said National Labor Relations Act, being a regulation of commerce among the several States in violation of a law of the United States regulating such commerce, which is the supreme law of the land.

3. The Court of Appeals of the State of New York erred in affirming the judgment dismissing the complaint upon the merits, for in so doing it held that the laws of the State of New York, and particularly the said Labor Law, gave the appellees jurisdiction to decide the unit appropriate for the purposes of collective bargaining, to investigate a controversy concerning the representation of supervisory employees of the appellant, and to certify the name or names of the representatives designated or selected, though the said employees were engaged in interstate commerce and subject to the jurisdiction of the National Labor Relations Board, which under the provisions of the said National Labor Relations Act had already certified a representative for purposes of collective bargaining for other employees of the appellant at the same plant and had expressed a policy against recognizing [fols. 88-111] supervisory employees as constituting an appropriate collective bargaining unit. The said Labor Law of New York as so applied is repugnant to Article I, Section 8, clause 3, and Article VI, clause 2, of the Constitution of the United States and to the said National Labor Relations Act, being a regulation of commerce among the several States in violation of a law of the United States regulating such commerce, which is the supreme law of the land.

Wherefore appellant prays that the judgment of the Supreme Court of the State of New York for Chautauqua County, which made the order and judgment of the Court of Appeals of the State of New York its order and judgment, be reversed, and that judgment be entered for appel-

lant in accordance with the prayers of its complaint, and for its costs sustained in the action.

Dated: February 19, 1946.

John G. Buchanan, Welles V. Moot, Attorneys for The Allegheny Ludlum Steel Corporation, Appellant.

[fol. 112] SUPREME COURT OF THE UNITED STATES

[Title omitted]

ORDER ALLOWING APPEAL—Filed March 5, 1946

The petition of The Allegheny Ludlum Steel Corporation for an appeal in the above case to the Supreme Court of the United States from the Supreme Court of the State of New York for Chautauqua County, from the judgment of the said court entered in the office of the Clerk of Chautauqua County on the 28th day of December, 1945, upon the order and judgment of the Court of Appeals of the State of New York dated November 30, 1945, which was adopted and became the order and judgment of the said Supreme Court by order of Mr. Justice Parton Swift dated the 26th day of December, 1945, and entered in the office of the Clerk of Chautauqua County on the 27th day of December, 1945, the assignment of errors and prayer for reversal filed therewith, and the record of said cause having been considered, it is

Ordered that an appeal be, and it hereby is, allowed to the Supreme Court of the United States from the Supreme Court of the State of New York for Chautauqua County, from the judgment of the said court entered in the office of the Clerk of Chautauqua County on the 28th day of December, 1945, upon the order and judgment of the Court of Appeals of the State of New York, dated November 30, 1945, which was adopted and became the order and judgment of the said Supreme Court by an order of Mr. Justice Parton Swift dated the 26th day of December, 1945, and entered in the office of the Clerk of Chautauqua County on the 27th day of December, 1945, as prayed in said petition, and that the Clerk of the Supreme Court of the State of New York [fol. 113] for Chautauqua County shall prepare and certify a transcript of the record and proceedings in the above cause and transmit the same to the Supreme Court of the

United States within forty days from the date hereof; and it is further

Ordered that said The Allegheny Ludlum Steel Corporation shall give good and sufficient security in the sum of Two Thousand dollars, that the said appellant shall prosecute its appeal to effect, and, if it fail to make its plea good, shall answer all costs.

The said appellant now presenting a bond in the sum of Two Thousand dollars, with American Bonding Company of Baltimore, as surety, it is

Ordered that the same be, and it hereby is, approved. Dated: February 23, 1946.

John T. Loughran, Chief Judge of the Court of Appeals of the State of New York.

[fols. 114-115] Citation in usual form showing service on William E. Grady, Jr., filed March 5, 1946, omitted in printing.

[fol. 116] SUPREME COURT OF THE UNITED STATES

STIPULATION INDICATING PORTIONS OF RECORD TO BE INCLUDED IN TRANSCRIPT—Filed March 5, 1946

It is hereby stipulated and agreed by and between the undersigned attorneys for the appellant and the undersigned attorney for the appellees in the cause above named that the portions of the record which shall constitute the transcript of record on the appeal to the Supreme Court of the United States herein shall consist of the following:

1. Notice of Appeal to the Appellate Division.
2. Judgment of the Supreme Court, Chautauqua County, entered October 3, 1944.
3. Order of the Supreme Court, Chautauqua County, filed October 3, 1944.
4. Summons.
5. Complaint.
6. Amended Answer.
7. Notice of Motion.
8. Affidavit of H. Myron Lewis, in Support of Motion.
9. Affidavit of Ernest E. Cavagnaro, in Support of Motion.
10. Affidavit of Stanley A. McCaskey, in Opposition to Motion.

11. Reply Affidavit of H. Myron Lewis, in Support of Motion.

12. Stipulation (as to number of appellant's employees, certification of collective bargaining representative of employees other than foremen, etc.).

13. Opinion of the Supreme Court, Chautauqua County.

[fol. 117] 14. Notice of Appeal to the Court of Appeals.

15. Judgment of Affirmance of the Appellate Division.

16. Order of Affirmance of the Appellate Division.

17. Affidavit of No Opinion.

18. Order and remittitur of the Court of Appeals.

19. Order of the Supreme Court, Chautauqua County, dated December 26, 1945.

20. Judgment of the Supreme Court, Chautauqua County, entered December 28, 1945.

21. Petition for Appeal to the Supreme Court of the United States.

22. Assignment of Errors and Prayer for Reversal.

23. Appellant's Jurisdictional Statement.

24. Order Allowing Appeal.

25. Citation.

26. This Stipulation.

The Clerk of the Supreme Court of the State of New York ~~for the County~~ of Chautauqua is requested to prepare a transcript of the record as required by law and the Rules of the Supreme Court of the United States and to include therein the papers above designated, and no others, and to transmit the said transcript to the Clerk of the Supreme Court of the United States at Washington, District of Columbia, on or before the 4th day of April, 1946.

This stipulation is made and entered into pursuant to Rule 10 of the Rules of the Supreme Court of the United States.

Dated this 2 day of March, 1946.

John G. Buchanan, Welles V. Moot, Attorneys for Appellant. William E. Grady, Jr., Attorney for Appellees.

[fols. 118-119] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 120] SUPREME COURT OF THE UNITED STATES

• • • • • • •

STATEMENT OF POINTS ON WHICH APPELLANT INTENDS TO RELY AND DESIGNATION OF THE PARTS OF THE RECORD NECESSARY FOR THE CONSIDERATION THEREOF—Filed April 13, 1946

Comes now The Allegheny Ludlum Steel Corporation, the appellant in the above entitled cause, and adopts its assignments of error as its statement of the points on which it intends to rely, and states that the whole of the record as filed is necessary for the consideration thereof.

Dated: April 3, 1946.

John G. Buchanan, Counsel for Appellant.

Service of the above statement and designation, and the receipt of a copy thereof, are hereby acknowledged this 11 day of April, 1946.

William E. Grady, Counsel for Appellees.

[fol. 120a] [File endorsement omitted.]

[fol. 121] SUPREME COURT OF THE UNITED STATES

• • • • • • •

ORDER NOTING PROBABLE JURISDICTION—April 22, 1946

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted and the case is consolidated with No. 941, Bethlehem Steel Company et al. vs. New York State Labor Relations Board for argument. The Solicitor General of the United States is requested to file a brief as *amicus curiae* and, if so advised, to participate in the oral argument.

Mr. Justice Jackson took no part in the consideration or decision of this order.

Endorsed on cover: File No. 50,751, New York Supreme Court, Chautauqua County. Term No. 76. The Allegheny Ludlum Steel Corporation, Appellant, vs. William J. Kelley and H. Myron Lewis, Constituting the State Labor Relations Board of the State of New York. Filed April 3, 1946. Term No. 76 O. T. 1946.

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CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. [redacted] 76

THE ALLEGHENY LUDLUM STEEL CORPORATION,
Appellant,

vs.

WILLIAM J. KELLEY AND H. MYRON LEWIS, CONSTITUTING THE STATE LABOR RELATIONS BOARD OF THE STATE OF NEW YORK.

APPEAL FROM THE SUPREME COURT OF THE STATE OF NEW YORK
FOR THE COUNTY OF CHAUTAUQUA

JOHN G. BUCHANAN,
WELLES V. MOOT,
Counsel for Appellant.

INDEX

Subject Index

	Page
Statement as to jurisdiction	1
Statutory provisions sustaining jurisdiction	1
State statute involved	2
Date of the judgment sought to be reviewed and date of application for appeal	2
Nature of the case	2
Substantial nature of federal questions	11
Propriety of appeal	13
Substantiality of questions involved	15
Cases believed to sustain the jurisdiction	17
Appendix "A"—New York State Labor Relations Act	19
Appendix "B"—Opinion of the Supreme Court of New York for the County of Chautauqua	38

Table of Cases Cited

Adams Express Co. v. *Croninger*, 226 U. S. 491	17
Aetna Life Ins. Co. v. *Haworth*, 300 U. S. 227	13
Allen-Bradley Local No. 1111 v. *Wisconsin Employment Relations Board*, 315 U. S. 740	15
Charleston, etc., Ry. Co. v. *Varnville Furniture Co.*, 237 U. S. 597	17
Chicago, etc., Ry. Co. v. *Hardwick Farmers Elevator Co.*, 226 U. S. 426	17
Cloverleaf Butter Co. v. *Patterson*, 315 U. S. 148	18
Dahnke-Walker Milling Co. v. *Bondurant*, 257 U. S. 282	14
Erie R. R. Co. v. *People of the State of New York*, 233 U. S. 671	17
Fiske v. *Kansas*, 274 U. S. 380	14
Gibbons v. *Ogden*, 9 Wheat. 1	17
Gulf, etc., Ry. Co. v. *Hefley*, 158 U. S. 98	17
Hill v. *Florida*, 325 U. S. 538	16
Illinois Natural Gas Co. v. *Central Illinois Public Service Co.*, 314 U. S. 498	18
Lewis v. *Board of Education*, 275 N. Y. 480	11
Matter of Allegheny Ludlum Steel Corporation and Steel Workers' Organizing Committee, Case No. III-R-411	4

Page

Missouri Pacific R. R. Co. v. Porter, 273 U. S. 341 14, 18
Missouri Pacific R. R. Co. v. Stroud, 267 U S. 404 18
Napier v. *Atlantic Coast Line R. R. Co.*, 272 U. S. 605 18
Nashville, etc., Ry. Co. v. *Wallace*, 288 U. S. 249 13
Northern Pacific Ry. Co. v. *State of Washington*, 222 U. S. 370 17
Oregon-Washington R. R. & Navigation Co. v. *State of Washington*, 270 U. S. 87 18
Pennsylvania R. R. Co. v. *Public Service Commission of the Commonwealth of Pennsylvania*, 250 U. S. 566 18
People v. *Lynch*, 262 N. Y. 1 11
Postal Telegraph Cable Co. v. *Warren-Godwin Lumber Co.*, 251 U. S. 27 18
Railway Mail Association v. *Corsi*, 326 U. S. 88 13
Savage v. *Jones*, 225 U. S. 501 14
Second Employers' Liability Cases, 223 U. S. 1 17
Southern Ry. Co. v. *Railroad Commission of Indiana*, 236 U. S. 439 17
Standard Oil Co. v. *Johnson*, 316 U. S. 481 14
Stewart & Co. v. *Sadrakula*, 309 U. S. 94 14
United States v. *County of Allegheny*, 322 U. S. 174 14

STATUTES CITED

Civil Practice Act of New York:
Section 473 (L. 1920, c. 925, Article 35, Section 473) 5
Section 588, Subdivision 1 (L. 1942, c. 297) 10
Constitution of the United States:
Article I, Section 8 6
Article III, Section 1 13
Article III, Section 2 13
Judicial Code, Section 237(a) (28 U. S. C. 344a) 1
Labor Law of the State of New York, Article 20, L. 1937, c. 43, Section 1, as amended (30 McKinney's Consolidated Laws, Sections 700-716, effective May 20, 1937) 2
National Labor Relations Act (49 Stat. 453, 29 U. S. C. 151) 3

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 1048

THE ALLEGHENY LUDLUM STEEL CORPORATION,
Appellant,

vs.

WILLIAM J. KELLEY AND H. MYRON LEWIS, CONSTITUTING THE STATE LABOR RELATIONS BOARD OF THE STATE OF NEW YORK,
Appellees

STATEMENT OF BASIS UPON WHICH APPELLANT CONTENDS THAT THE SUPREME COURT OF THE UNITED STATES HAS JURISDICTION UPON APPEAL TO REVIEW THE JUDGMENT APPEALED FROM.

Pursuant to Rule 12, paragraph 1, of the Supreme Court of the United States, the applicant for the allowance of an appeal in the above entitled case files its statement particularly disclosing the basis upon which it is contended that the Supreme Court of the United States has jurisdiction upon appeal to review the judgment in question, as follows:

I

The statutory provision believed to sustain the jurisdiction is Section 237(a) of the Judicial Code of the United States (U. S. C., Title 28, § 344(a)).

II

The statute of the State, the validity of which is involved, is the Labor Law of the State of New York, Article 20, L. 1937, c. 443, § 1, as amended, 30 McKinney's Consolidated Laws §§ 700-716, effective May 20, 1937, and particularly Section 705 thereof, providing (inter alia) that the State Labor Relations Board shall decide the unit appropriate for the purposes of collective bargaining and whenever it is alleged by an employee or an employer that there is a question (with an exception not material in this case) concerning the representation of employees, shall investigate such question and certify the name or names of the representatives who have been designated or selected. The validity of the said statute is involved insofar as it applies to employees engaged in interstate commerce. A copy of the said statute is attached hereto as Appendix A.

III

The date of the judgment sought to be reviewed was November 30, 1945, and the date upon which the application for appeal is presented is February 16, 1946.

IV

The appellant on April 14, 1944, served a complaint in the Supreme Court of the State of New York for the County of Chautauqua (R. 24). In this complaint the appellant alleged (inter alia) substantially as follows:

The appellant owned a steel mill and leased a second steel mill in Dunkirk, Chautauqua County, New York, and operated the said mills (hereinafter referred to as its plant) (R. 24-25). The appellees constituted the State Labor Relations Board of the State of New York (R. 25). The Foremen's Association of America, Allegheny Ludlum

Steel Corporation Chapter No. 58, was a labor union and its membership was limited to supervisory employees whose work consisted solely of supervising other employees of the appellant hired in connection with the operation of its Dunkirk plant (R. 27-28). The said union filed its petition with the said Labor Relations Board, alleging that a question or controversy had arisen concerning the representation of supervisory employees of the appellant, and requesting that the Board certify the said union as the appropriate representative for collective bargaining by such supervisory employees of the appellant at its said plant (R. 28-29). The appellant duly moved that said petition be dismissed upon the ground that the Labor Relations Board of the State of New York had no jurisdiction in the premises and because the said union was not an appropriate collective bargaining unit (R. 30). The appellees refused to agree with the appellant that its employees at its said Dunkirk plant were subject to and protected by the provisions of the National Labor Relations Act, and the appellees continued wrongfully to assert jurisdiction of the matters covered by the said petition (R. 30-31). Approximately 95% in value of the products shipped from said Dunkirk plant were shipped to points outside New York and 86% in value of raw materials purchased for use in the plant were received from outside New York and of materials partially fabricated at other plants of the corporation and shipped to said Dunkirk plant for further fabrication over 85% in value were shipped from outside New York, and the appellant in operating its said plant was engaged in interstate commerce (R. 31-32). Pursuant to the National Labor Relations Act, 49 Stat. 453, 29 U. S. C. §§ 151 ff. the National Labor Relations Board had the sole power to determine appropriate bargaining units among the employees of the appellant at its said Dunkirk plant, whether said employees were or were not employed in a supervisory capacity (R. 34). It was the settled policy

of the National Labor Relations Board to refuse to certify a union of supervisory employees of such a character as the Foremen's Association of America, Allegheny Ludlum Steel Corporation Chapter No. 58, as a bargaining agent, because the said Board did not regard a bargaining unit consisting solely of supervisory employees, whose only work was to supervise other employees, as an appropriate bargaining unit, and, except under exceptional circumstances, which did not obtain in the premises, certification of all unions of supervisory employees had been refused by the said Board (R. 34-36). The said National Labor Relations Board had, in a case entitled "Matter of Allegheny Ludlum Steel Corporation and Steel Workers' Organizing Committee, Case No. III-R-411," exercised jurisdiction over the appellant and certain of the employees of said Dunkirk mills of the appellant and certified a collective bargaining representative for said employees, which certification was still in full force and effect (R. 36). By virtue of the Acts of Congress and the acts and decisions of the National Labor Relations Board Congress and the Board had assumed jurisdiction over the entire field of controversies within which the present controversy fell (R. 37). As to all such matters of jurisdiction of the National Labor Relations Board was exclusive and the Labor Relations Board of the State of New York had no jurisdiction to entertain the said petition or to make any determination of the questions and issues raised and presented by it and presently before the State Labor Relations Board (R. 37-38). By reason of the threatened continuance of said proceedings before the New York State Labor Relations Board the appellant was threatened with the issuance of an order by the appellees, pursuant to which an election to determine a bargaining unit for the said supervisory employees of the appellant would be held, and the holding of such an election and the issuance of such order would cause irreparable harm and damage to the

appellant (R. 39). Such action of the appellees destroyed the harmonious relations between the appellant and its supervisory employees, defeated the purpose of the Act by causing instead of preventing labor disputes, and placed the appellant in a position of being ordered to perform actions and to conduct itself in relation to its supervisory employees in a manner directly in conflict with the declared policy of the National Labor Relations Board, all of which impaired the war effort (R. 40). The appellant was threatened with substantial and irreparable injury (inter alia) because it might thereafter be subjected to conflicting rulings of the State Labor Relations Board and the National Labor Relations Board as regards its relations with its said supervisory employees and with the said union and might be directed by the State Labor Relations Board to do that which was illegal under the National Labor Relations Act and the rulings of the National Labor Relations Board (R. 40-42). The appellant was advised and believed that the actions of the New York State Labor Relations Board in the premises and the provisions of the New York State Labor Relations Act, insofar as the same might apply to the appellant and its relation to its supervisory employees, were void, because in violation of the provisions of the Constitution of the United States, since that Act, as the said State Board threatened to apply it in this instance, denied due process of law and violated Article I, Section 8, giving the Federal Government control of interstate commerce (R. 42-43). The appellant, in view of the inapplicability of the provisions of the New York State Labor Relations Act to it and to its relations with its said supervisory employees, was bringing this action pursuant to Section 473 of the Civil Practice Act, L. 1920, c. 925, Article 35, § 473, to obtain a judicial determination of the jurisdiction of the Labor Relations Board of the State of New York in the premises (R. 43-44).

The appellant prayed that a declaratory judgment be made and entered adjudging (inter alia) that the appellees had no jurisdiction over the appellant or its supervisory employees at its Dunkirk plant (R. 47); that the appellees might not properly certify the Foremen's Association of America, Allegheny Ludlum Steel Corporation Chapter No. 58, as the appropriate bargaining unit for the foremen or other supervisory employees of the appellant at its said plant (R. 47-48); that the appellees had no jurisdiction to hold an election or to attempt to hold an election for the purpose of determining a representative of the said supervisory employees to bargain collectively with the appellant or to order the appellant to bargain collectively with any such representative (R. 48-49); that the appellees be restrained and enjoined from holding an election or attempting to hold an election for the purpose of determining a representative of the said supervisory employees to bargain collectively with the appellant, or from taking any other action in connection with the appellant or its employees under the provisions of the New York State Labor Relations Act (R. 49-50).

The stage in the proceedings in the court of first instance at which the federal questions sought to be reviewed were raised was in paragraph 21 of the complaint summarized in the previous paragraph, where it was pleaded (R. 42-43) that the provisions of the New York State Labor Relations Act, insofar as the same might apply to the appellant and its relation to its supervisory employees, were void because in violation of the provisions of the Constitution of the United States, since that Act, as the New York State Labor Relations Board threatened to apply it in this instance, denied due process of law and violated Article I, Section 8, giving the Federal Government control of interstate commerce. This allegation was denied by the appellees in paragraph 1 of their amended answer (R. 57).

The appellees gave notice that upon the complaint and amended answer they would move the court for an order granting judgment dismissing the complaint on the ground that on the face of the pleadings the appellees were entitled to the relief requested in their amended answer, and on the ground that the complaint did not state facts sufficient to constitute a cause of action (R. 168-169); and further notice that upon the complaint and amended answer and annexed affidavits they would move the court for an order dismissing the complaint and directing that judgment to that effect be entered in their favor on the ground that the action had no merit (R. 169-170).

It was stipulated that the C. I. O. had been certified by the National Labor Relations Board as collective bargaining representative of appellant's employees, other than foremen, employed at its five plants, including plants at Brackenridge and West Leechburg, Pennsylvania, and Dunkirk, New York, and a single contract had been made covering such employees, other than foremen (R. 248-249). It was further stipulated that the court might take cognizance of all decisions of the National Labor Relations Board and the State Labor Relations Board (R. 250).

Mr. Justice Hinkley of the Supreme Court ordered that the motions of the appellees be granted in all respects and that the complaint be dismissed upon the merits and that judgment be entered in favor of the appellees and against the appellant (R. 17-19). This is the way in which the federal questions were passed upon by the court of first instance. It is believed that the places in the record where the matter appears, to which we have referred, will support the assertion that the ruling of the court was of a nature to bring the case within the statutory provision believed to confer jurisdiction on the Supeme Court of the United States.

A copy of the opinion of Mr. Justice Hinkley, delivered upon the rendering of his judgment (R. 252-270), is appended hereto as Appendix B. The rulings of the court of first instance are illustrated by the following excerpts from its opinion:

> "This decision, by agreement of counsel, is not only determinative of defendants' motion to dismiss the complaint under Rules 112 and 113 of the General Rules of Practice but also of the trial of the Equity action itself. There are no disputed questions of fact but only questions of law (R. 252).
>
> * * * * * * *
>
> "Plaintiff contends that the defendants are without jurisdiction to act in the matter. This contention is based upon the fact that the plaintiff is engaged in interstate commerce and that the jurisdiction rests exclusively with the National Labor Relations Board by virtue of the National Labor Relations Act (49 Stat. 449, U. S. Code, Title 29, Chapter 7, U. S. C. 151). Plaintiff also contends that if the defendants have jurisdiction under ordinary circumstances that they are not authorized to receive and act upon the petition of the said Foremen's Union because of a definite policy adopted by the National Labor Relations Board decreeing that a unit composed entirely, as this one is, of foremen or those occupying a supervisory position with the Company is not an appropriate unit for collective bargaining.
>
> "Defendants contend that they are vested with jurisdiction; that they were required to act; that they are not controlled by any policy of The National Labor Relations Board, and that the Union in question is an appropriate bargaining agent for collective bargaining (R. 255-257).
>
> * * * * * *
>
> "The Court is not called upon nor does it desire to express its opinion of the logic or reasoning or right

or wrong of the conflict of policy of the Federal and State Labor Relations Boards. In the absence of a definite intent of statutory regulation and in the further absence of judicial precedent, the Court cannot properly decree that in this instance the defendants are without jurisdiction to act simply because the National Labor Relations Board would not act under similar circumstances. * * *. (R. 264-265.)

"The Court cannot read into the legislation upon labor relations any intent upon the part of Congress to cover the whole field of employer and employee relations in industrial plants engaged in interstate commerce by the Act of Congress in creating The National Labor Relations Board. If so, then state action would be precluded. (Napier vs. Atlantic Coast Line, 272 U. S., 605, at 613; Oregon-Washington R. & N. Co. vs. Washington, 270 U. S., 87.) Congress cannot be held to have intended to supercede or suspend the exercise of reserved powers of a State, even when that may be done, unless and except so far as its purpose to do so is clearly manifested. (Illinois Central R. Co. vs. Public Utilities Com., 245 U. S., 493, 510. Approved in Welch Co. vs. New Hampshire, 306 U. S., 79, 85.)

"Here we have, in the language of Chief Justice Stone (Cloverleaf vs. Patterson, 315 U. S., 148 at 170 dissenting opinion) an unexercised discretionary power given by Congress to a Federal Board as a means of regulating interstate commerce, when the full exercise of its authority would conflict with an assertion of the State power. But only in a case where the intention of Congress to give to the Federal Board exclusive control over the entire field is clearly manifested can the power of the State to act be superseded. (N. W. Bell Tel. Co. vs. Ry. Commission, 297 U. S., 471.) In the absence of such clear intention it cannot be said that the failure of the Federal Board to exercise its full power is in effect a controlling administrative ruling that no further regulation by either Federal or State government is proper or needful.

"It follows that defendants' motion to dismiss the plaintiff's complaint under Rules 112 and 113 must be granted and judgment entered in favor of defendants dismissing plaintiff's complaint upon the merits and not as matter of discretion." (R. 266-269.)

V

The appellant, on October 28, 1944, filed and served upon the attorney for the appellees a notice of appeal to the Appellate Division of the Supreme Court for the Fourth Department from the order made at the Special Term for the County of Chautauqua and the judgment entered thereon (R. 2-6). No assignments of error are required or employed in appeals in the State of New York. The appeal in itself raised the federal questions sought to be reviewed, which had been passed upon by the court of first instance.

The said Appellate Division, on May 1, 1945, passed upon the federal questions sought to be reviewed by unanimously ordering that the judgment and order appealed from be affirmed with costs (R. 286-289). No opinion was handed down (R. 290-291). The judgment of affirmance was entered in the office of the Clerk of Chautauqua County (R. 282-285).

The appellant, on June 6, 1945, filed and served upon the attorney for the appellees a notice of appeal to the Court of Appeals (R. 277-281). The appeal was taken as of right, pursuant to the provisions of subdivision 1 of Section 588 of the Civil Practice Act (added by L. 1942, c. 297), the appellant "relying upon questions herein raised involving the construction of the Constitution of the United States of America" (R. 278). The order of the Appellate Division being unanimous, the appeal under the section referred to lay as of right only because the construction of the Constitution was directly involved. To use

the language of the Court of Appeals in *People* v. *Lynch*, 262 N. Y. 1 (1933), at p. 4:

> "An appeal upon the ground asserted here must present to us directly and primarily an issue determinable only by our construction of the Constitution."

The appeal would have been dismissed if the constitutional questions had not been the sole questions involved in the appeal. *Lewis* v. *Board of Education*, 275 N. Y. 480 (1937).

The Court of Appeals, on November 30, 1945, passed upon the federal questions sought to be reviewed by ordering and adjudging that the judgment of the Appellate Division of the Supreme Court appealed from be affirmed, with costs, and that the records in the case, and the proceedings in the Court of Appeals, be remitted to the Supreme Court, there to be proceeded upon according to law (R. ——). No opinion was delivered by the Court of Appeals upon the rendering of its judgment.

The order and judgment of the Court of Appeals was made the order and judgment of the Supreme Court of the State of New York for the County of Chautauqua by order of Parton Swift, Justice of the Supreme Court, on December 26, 1945, (R. ——), and judgment was entered thereon in the Supreme Court of the State of New York for Chautauqua County on December 28, 1945 (R. ——).

VI

The grounds upon which it is contended that the questions involved are substantial are as follows:

The case involves a question of great importance which has not yet been determined by the Supreme Court of the United States.

The National Labor Relations Act provides that the National Labor Relations Board shall decide whether, in

order to insure to employees the full benefit of their right to self-organization and to collective bargaining, and otherwise to effectuate the policies of the Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof; and that whenever a question affecting commerce among the several States arises concerning the representation of employees, the Board may investigate such controversy and certify to the parties the name or names of the representatives that have been designated or selected. A State labor relations act provides that a State board shall decide in each case the unit appropriate for the purposes of collective bargaining (except where the majority of employees of a particular craft shall decide that such craft is the appropriate unit), and shall investigate any question or controversy concerning the representation of employees and certify the name or names of the representatives who have been designated or selected. Is this provision of the State act, insofar as it is applied to employees engaged in interstate commerce, repugnant to the commerce clause of the Constitution and the National Labor Relations Act?

In the case at bar the question may be more narrowly stated as a question whether the State statute as so applied is repugnant to the commerce clause and the National Labor Relations Act where the National Labor Relations Board, pursuant to the said Act, had already certified a representative for the purposes of collective bargaining for other employees of the employer at the same plant as the employees here involved.

Is the State statute as so applied repugnant to the commerce clause and the National Labor Relations Act where the National Labor Relations Board had expressed a policy against recognizing supervisory employees as constituting an appropriate collective bargaining unit, but the State stat-

ute is held to authorize the State Board to recognize such employees as constituting such a unit? After the decision in the court of first instance the National Labor Relations Board expressed in later cases a change in this policy. It is believed, however, that the question is still implicitly involved, because the later decisions of the National Labor Relations Board may be reversed and because, if they are not reversed, the question of policy should be one for the National Labor Relations Board and not for State labor relations boards to determine.

VII

The cases believed to sustain jurisdiction are briefly discussed below:

Propriety of Appeal

Railway Mail Association v. *Corsi*, 326 U. S. 88, shows that an appeal from a New York State court declaratory judgment proceeding in a case like the one at bar presents a justiciable "case or controversy" under Sections 1 and 2 of Article III of the Federal Constitution. The conflicting contentions of the parties in this case as to the validity of the State statute as hereby applied present a real, substantial controversy between parties having adverse legal interests, a dispute definite and concrete, not hypothetical or abstract. Legal rights asserted by appellant are threatened with imminent invasion by appellees and will be directly affected to a specific and substantial degree by decision of the questions of law. See also *Nashville, etc., Ry. Co.* v. *Wallace*, 288 U. S. 249; *Aetna Life Ins. Co.* v. *Haworth*, 300 U. S. 227.

In the State courts the appellant distinctly insisted that the New York State Labor Relations Act, insofar as the same might apply to the appellant and its relation to its supervisory employees, was void, because in conflict with the

commerce clause of the Constitution (R., ff. 42-43). The courts did not accede to the insistence, but applied and enforced the statute. That was an affirmation of its validity when so applied. That the statute was not claimed to be invalid in toto and for every purpose does not matter. *Dahnke-Walker Milling Co.* v. *Bondurant*, 257 U. S. 282, 288-289; *Fiske* v. *Kansas*, 274 U. S. 380, 385; *United States* v. *County of Allegheny*, 322 U. S. 174, 192.

The Supreme Court of the State of New York in its opinion based its decision on the ground that it could not "read into the legislation upon labor relations any intent upon the part of Congress to cover the whole field of employer and employee relations in industrial plants engaged in interstate commerce by the act of Congress in creating the National Labor Relations Board" (R., f. 266). But the question as to the construction of the Act of Congress is a Federal question, to be determined by the Supreme Court of the United States. *Cf. Standard Oil Co.* v. *Johnson*, 316 U. S. 481, 483. And when the State court construed the Act of Congress as not occupying the field of collective bargaining units for employees engaged in interstate commerce, a statute of the State necessarily was sustained against a contention that its application to the circumstances violated the provisions of the Constitution. So the Supreme Court of the United States has jurisdiction under § 237 (a) of the Judicial Code, as amended. *Stewart & Co.* v. *Sadrakula*, 309 U. S. 94, 97; *Savage* v. *Jones*, 225 U. S. 501, 519; *Missouri Pacific R. R. Co.* v. *Porter*, 273 U. S. 341, 343; *United States* v. *County of Allegheny*, 322 U. S. 174, 192.

It was admitted that the appellant and its employees were subject to the National Labor Relations Act. The State courts upheld the order of the State board because the Federal board had not undertaken, so far as supervisory employees were concerned, to exercise the jurisdiction which

that Act conferred on it. Under such circumstances the decision upholding the order of the State board is one in favor of the validity of the State statute as so applied and may be reviewed by the Supreme Court of the United States upon appeal. *Allen-Bradley Local No. 1111* v. *Wisconsin Employment Relations Board,* 315 U. S. 740, 745.

Substantiality of Questions Involved

In *Allen-Bradley Local No. 1111* v. *Wisconsin Employment Relations Board,* 315 U. S. 740, the Court held that an order of a State board that a union cease and desist from mass picketing, threatening employees, obstructing or interfering with factory entrances or the free use of public streets, roads and sidewalks, and picketing the homes of employees, which were unfair labor practices under the Wisconsin Employment Peace Act, was not unconstitutional as being repugnant to the National Labor Relations Act. The Court pointed out that Congress had not made such employee and union conduct as was involved in that case subject to regulation by the Federal Board, and said that it would not lightly infer that Congress by the mere passage of a federal Act had impaired the traditional sovereignty of the States over such local matters as public safety and order and the use of streets and highways (p. 749). The Court added, however, (p. 751):

> "If the order of the state Board affected the status of the employees, or if it caused a forfeiture of collective bargaining rights, a distinctly different question would arise."

It is submitted that the case at bar presents such "a distinctly different question" of great importance, affecting the status of employees in the matter of collective bargaining rights.

Hill v. *Florida*, 325 U. S. 538, foreshadows the case at bar. The Court found it necessary to decide in that case whether a Florida statute regulating labor union activities had been applied in a manner which brought it into irreconcilable conflict with the collective bargaining regulations of the National Labor Relations Act. The Florida court had held valid a provision of the Florida statute that no one should be licensed as a business agent of a labor union who had not been a citizen of the United States for more than ten years, who had been convicted of a felony, or who was not a person of good moral character. For failure to comply with another provision requiring every labor union operating in the State to file a written report with the Secretary of State, disclosing its name, the location of its offices, and the names and addresses of its officers, a union had been enjoined from functioning as a labor union. Another provision made it a misdemeanor for any person or labor organization to violate the statute. The Supreme Court of the United States held that the National Labor Relations Act and the Florida act, as here applied, could not "move freely within the orbits of their respective purposes without impinging upon one another" (p. 543), and accordingly reversed the decree of the Florida court.

It is submitted that in principle the decision of the New York courts in the case at bar is in conflict with the case just cited. It is obvious that the National Labor Relations Board and the New York State Labor Relations Board cannot both decide the unit appropriate for the purposes of collective bargaining for employees of the appellant engaged in interstate commerce at the same plant "without impinging upon one another." If a demonstration of the conflict of the collective bargaining regulations of the State statute with the regulations of the Act of Congress were necessary, the conflict would be shown by the fact that the latter (§9

(b)) confines the National Labor Relations Board, in deciding the unit appropriate for the purposes of collective bargaining, to "the employee unit, craft unit, plant unit, or subdivision thereof," whereas the New York statute (§705(2)) permits the New York board to decide that the unit shall be "the employer unit, multiple employer unit, craft unit, plant unit, or any other unit; provided, however, that in any case where the majority of employees of a particular craft shall so decide the board shall designate such craft as a unit appropriate for the purpose of collective bargaining." The conflict, moreover, is apparent from the fact that when the National Labor Relations Board certified a representative for purposes of collective bargaining for certain employees of the appellant it had a policy against recognizing supervisory employees as constituting an appropriate collective bargaining unit, while the New York board had no such policy.

It is believed that the following cases also sustain the contention that the questions involved are substantial:

Gibbons v. *Ogden*, 9 Wheat. 1, 209-211;

Gulf, etc. Ry. Co. v. *Hefley*, 158 U. S. 98, 104;

Northern Pacific Ry. Co. v. *State of Washington*, 222 U. S. 370, 378-379;

Second Employers' Liability Cases, 223 U. S. 1, 53-55;

Chicago, etc. Ry. Co. v. *Hardwick Farmers Elevator Co.*, 226 U. S. 426, 435;

Adams Express Co. v. *Croninger*, 226 U. S. 491, 504-508;

Erie R. R. Co. v. *People of the State of New York*, 233 U. S. 671, 681-683;

Southern Ry. Co. v. *Railroad Commission of Indiana*, 236 U. S. 439, 446-447;

Charleston etc. Ry. Co. v. *Varnville Furniture Co.*, 237 U. S. 597, 604;

Pennsylvania R. R. Co. v. *Public Service Commission of the Commonwealth of Pennsylvania,* 250 U. S. 566, 569;

Postal Telegraph-Cable Co. v. *Warren-Godwin Lumber Co.,* 251 U. S. 27, 30-31;

Missouri Pacific R. R. Co. v. *Stroud,* 267 U. S. 404, 408;

Oregon-Washington R. R. & Navigation Co. v. *State of Washington,* 270 U. S. 87, 102-103;

Napier v. *Atlantic Coast Line R. R. Co.,* 272 U. S. 605, 612-613;

Missouri Pacific R. R. Co. v. *Porter,* 273 U. S. 341, 345-346;

Illinois Natural Gas Co. v. *Central Illinois Public Service Co.,* 314 U. S. 498, 510;

Cloverleaf Butter Co. v. *Patterson,* 315 U. S. 148, 169.

Dated: February 19, 1946.

Respectfully submitted,

JOHN G. BUCHANAN,
WELLES V. MOOT,
Counsel for Appellant.

APPENDIX A

New York State Labor Relations Act

CHAPTER 443 OF THE LAWS OF 1937, ARTICLE 20 OF THE LABOR LAW AS AMENDED

AN ACT to amend the labor law, in relation to establishing a labor relations board to promote equality of bargaining power between employer and employee and to diminish the causes of industrial disputes by encouraging collective bargaining, and making an appropriation to the department of labor.

Became a law May 20, 1937, with the approval of the Governor. Passed, three-fifths being present.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

ARTICLE 20

NEW YORK STATE LABOR RELATIONS ACT

Section 700. Findings and policy.
701. Definitions.
702. Labor relations board.
703. Rights of employees.
704. Unfair labor practices.
705. Representatives and elections.
706. Prevention of unfair labor practices.
707. Judicial review.
708. Investigatory powers.
709. Punitive provision.
710. Public records and proceedings.
711. Estimate of annual administrative expenses; how paid.
712. Repeal of inconsistent provisions.
713. Limitations.
714. Separability.

715. Application of article.
716. Short title.

§ 700. *Findings and policy.* The economic necessity for employees to possess full freedom of association, actual liberty of contract and bargaining power equal to that of their employers, who are frequently organized in corporate or other forms of association, has long been sanctioned by public opinion, and recognized and affirmed by legislatures and the highest courts. As the modern industrial system has progressed, there has developed between and among employees and employers an ever greater economic interdependence and community of interest which have become matters of vital public concern. Employers and employees have recognized that the peaceable practice and wholesome development of that relationship and interest are materially aided by the general adoption and advancement of the procedure and practice of bargaining collectively as between equals. It is in the public interest that equality of bargaining power be established and maintained. It is likewise recognized that the denial by some employers of the right of employees freely to organize and the resultant refusal to accept the procedure of collective bargaining, substantially and adversely affect the interest of employees, other employers, and the public in general. Such denial creates variations and instability in competitive wage rates and working conditions within and between industries and between employees and employers engaged in such industries, and by depressing the purchasing power of wage earners and the profits of business, and tends (a) to produce and aggravate recurrent business depressions, (b) to increase the disparity between production and consumption, (c) to create unemployment with its attendant dangers to the health, peace and morale of the people, and (d) to increase public and private expenditures for relief of the needy and the unemployed.

When some employers deny the right of employees to full freedom of association and organization, and refuse to recognize the practice and procedure of collective bargaining, their actions lead to strikes, lockouts and other forms of industrial strife and unrest which are inimical to the

public safety and welfare, and frequently endanger the public health.

Experience has proved that protection by law of the right of employees to organize and bargain collectively, removes certain recognized sources of industrial strife and unrest, encourages practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours or other working conditions, and tends to restore equality of bargaining power between and among employers and employees, thereby advancing the interests of employers as well as employees.

In the interpretation and application of this article, and otherwise, it is hereby declared to be the public policy of the state to encourage the practice and procedure of collective bargaining, and to protect employees in the exercise of full freedom of association, self-organization and designation of representatives of their own choosing for the purposes of collective bargaining, or other mutual aid and protection, free from the interference, restraint or coercion of their employers.

All the provisions of this article shall be liberally construed for the accomplishment of this purpose.

This article shall be deemed an exercise of the police power of the state for the protection of the public welfare, prosperity, health and peace of the people of the state. (As amended by Chapter 689 of the Laws of 1940.)

1. The term "person" includes one or more individuals,

§ 701. *Definitions.* When used in this article:

1. The term "person" includes one or more individuals, partnerships, associations, corporations, legal representatives, trustees, trustees in bankruptcy, or receivers.

2. The term "employer" includes any person acting on behalf of or in the interest of an employer, directly or indirectly, with or without his knowledge, but a labor organization or any officer or agent thereof shall only be considered an employer with respect to individuals employed by such organization.

3. The term "employees" includes but is not restricted to any individual employed by a labor organization, any

individual whose employment has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment; and shall not be limited to the employees of a particular employer, unless the article explicitly states otherwise, but shall not include any individual employed by his parent or spouse or in the domestic service of any person in his home, or any individuals employed only for the duration of a labor dispute, or any individuals employed as farm laborers.

4. The term "representatives" includes a labor organization or an individual whether or not employed by the employer of those whom he represents.

5. The term "labor organization" means any organization which exists and is constituted for the purpose, in whole or in part, of collective bargaining, or of dealing with employers concerning grievances, terms or conditions of employment, or of other mutual aid or protection and which is not a company union as defined herein.

6. The term "company union" means any committee, employee representation plan or association of employees which exists for the purpose, in whole or in part, of dealing with employers concerning grievances or terms and conditions of employment, which the employer has initiated or created or whose initiation or creation he has suggested, participated in or in the formulation of whose governing rules or policies or the conducting of whose management operations or elections the employer participates in or supervises or which the employer maintains, finances, controls, dominates, or assists in maintaining or financing, whether by compensating anyone for services performed in its behalf or by donating free services, equipment, materials, office or meeting space or anything else of value, or by any other means.

7. The term "unfair labor practice" means only those unfair labor practices listed in section seven hundred four.

8. The term "labor dispute" includes, but is not restricted to, any controversy between employers and em-

ployees or their representatives as defined in this section concerning terms, tenure or conditions of employment or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to negotiate, fix, maintain or change terms or conditions of employment, or concerning the violation of any of the rights granted or affirmed by this article, regardless of whether the disputants stand in the proximate relation of employer and employee.

9. The term "board" means the labor relations board created by section seven hundred two.

10. The term "policies of this article" means the policies set forth in section seven hundred.

§ 702. *Labor relations board.* 1. There is hereby created in the department of labor a board to be known as the New York state labor relations board which shall be composed of three members who shall be appointed by the governor, by and with the advice and consent of the senate. Each member of the board at the time of his appointment shall be a citizen of the United States and a resident of the state of New York, and shall have been a qualified elector in the state for a period of at least one year next preceding his appointment. No member of the board during his period of service as such shall hold any other public office. One of the original members shall be appointed for a term of two years, one for a term of four years and one for a term of six years, but their successors shall be appointed for terms of six years each, except that any individual chosen to fill a vacancy shall be appointed for the unexpired term term of the number whom he is to succeed. The governor shall designate one member to serve as chairman of the board. Any member of the board may be removed by the governor for inefficiency, neglect of duty, misconduct or malfeasance in office, and for no other cause, after being given a copy of the charges and an opportunity to be publicly heard in person or by counsel.

2. A vacancy in the board shall not impair the right of the remaining members to exercise all the powers of the board, and two members of the board shall at all times,

constitute a quorum. The board may adopt an official seal and prescribe the purposes for which it shall be used.

3. The board shall at the end of every year make a report in writing to the governor, stating in detail the work it has done in hearing and deciding cases and otherwise, and it shall sign and report in full an opinion in every case decided by it.

4. Each member of the board shall receive a salary of ten thousand dollars a year, shall devote his entire time to the duties of his office, and shall not engage in any other business, vocation or employment. The board shall appoint an executive secretary and such attorneys, trial examiners and directors for local areas and such other employees and fix such salaries or other compensation therefor, as it may from time to time find necessary for the proper performance of its duties. The reasonable and necessary traveling and other expenses of the members of the board and other officers and employees of the board, while actually engaged in the performance of their duties shall be paid from the state treasury upon the audit and warrant of the comptroller, upon vouchers approved by the chairman. Attorneys appointed under this section may, at the direction of the board, appear for and represent the board in any case in court. The board may establish or utilize such regional, local or other agencies, and utilize such voluntary and uncompensated services as may from time to time be needed. As amended L. 1945, c. 138, eff. April 1, 1945.

5. All employees of the board shall be appointed by the board in accordance with the provisions of the civil service law and rules. (As amended by Chapter 4 of the Laws of 1940.)

6. The principal office of the board shall be in the city of Albany, but it may meet and exercise any or all of its powers at any other place within the state. The board may, by one or more of its members or by such agents or agencies as it may designate, conduct in any part of this state any proceeding, hearing, investigation, inquiry, or

election necessary to the performance of its functions. A member who participates in any such proceeding shall not be disqualified from subsequently participating in a decision of the board in the same case.

7. The board shall have authority from time to time to make, amend and rescind such rules and regulations as may be necessary to carry out the provisions of this article including the determination of the life of the selected representatives. Such rules and regulations shall be effective upon publication in the manner which the board shall prescribe.

8. Neither the board nor any of its agents or employees shall engage in any effort to mediate, conciliate or arbitrate any labor dispute, but nothing contained in this subdivision shall be construed to prevent the board, its agents or employees, from engaging in any effort to obtain voluntary adjustments and compliance with the terms and provisions of this article and in accordance with its purposes and policy. (As amended by Chapter 126 of the Laws of 1940.)

9. Notwithstanding the provisions of any other law, neither the industrial commissioner nor any board or other agency of the department of labor shall in any way direct, review, modify or reverse any decision or finding of the board nor shall the industrial commissioner or any board or other agency of the department of labor supervise or control the board in the exercise of any powers or in the performance of any duties under this article.

§ 703. *Rights of employees.* Employees shall have the right of self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection, free from interference, restraint, or coercion of employers, but nothing contained in this article shall be interpreted to prohibit employees from exercising the right to confer with their employer at any time, provided that during such conference there is no attempt by the employer, directly or indirectly, to interfere with,

restrain or coerce employees in the exercise of the rights guaranteed by this section. (As amended by Chapter 773 of the Laws of 1940.)

§ 704. *Unfair labor practices.* It shall be an unfair labor practice for an employer:

1. To spy upon or keep under surveillance, whether directly or through agents or any other person, any activities of employees or their representatives in the exercise of the rights guaranteed by section seven hundred three.

2. To prepare, maintain, distribute or circulate any blacklist of individuals for the purpose of preventing any of such individuals from obtaining or retaining employment because of the exercise by such individuals of any of the rights guaranteed by section seven hundred three.

3. To dominate or interfere with the formation, existence, or administration of any employee organization or association, agency or plan which exists in whole or in part for the purpose of dealing with employers concerning terms or conditions of employment, labor disputes or grievances, or to contribute financial or other support to any such organization, by any means, including but not limited to the following: (a) by participating or assisting in, supervising, controlling or dominating (1) the initiation or creation of any such employee organization or association, agency, or plan, or (2) the meetings, management, operation, elections, formulation or amendment of constitution, rules or policies, of any such employee organization or association, agency or plan; (b) by urging the employees to join any such employee organization or association, agency or plan for the purpose of encouraging membership in the same; (c) by compensating any employee or individual for services performed in behalf of any such employee organization or association, agency or plan, or by donating free services, equipment, materials, office or meeting space or anything else of value for the use of any such employee organization or association, agency or plan; provided that, an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay.

4. To require an employee or one seeking employment, as a condition of employment, to join any company union or to refrain from forming, or joining or assisting a labor organization of his own choosing.

5. To encourage membership in any company union or discourage membership in any labor organization, by discrimination in regard to hire or tenure or in any term or condition of employment: Provided that nothing in this article shall preclude an employer from making an agreement with a labor organization requiring as a condition of employment membership therein, if such labor organization is the representative of employees as provided in section seven hundred five.

6. To refuse to bargain collectively with the representatives of employees, subject to the provisions of section seven hundred five.

7. To refuse to discuss grievances with representatives of employees, subject to the provisions of section seven hundred five.

8. To discharge or otherwise discriminate against an employee because he has signed or filed any affidavit, petition or complaint or given any information or testimony under this article.

9. To distribute or circulate any blacklist of individuals exercising any right created or confirmed by this article or of members of a labor organization, or to inform any person of the exercise by any individual of such right, or of the membership of any individual in a labor organization for the purpose of preventing individuals so blacklisted or so named from obtaining or retaining employment.

10. To do any acts, other than those already enumerated in this section, which interfere with, restrain or coerce employees in the exercise of the rights guaranteed by section seven hundred three.

§ 705. *Representatives and elections.* 1. Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appro-

priate for such purposes or by the majority of the employees voting in an election conducted pursuant to this section shall be the exclusive representatives of all the employees in the appropriate unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: Provided, that employees directly or through representatives, shall have the right at any time to present grievances to their employer.

2. The board shall decide in each case whether, in order to insure to employees the full benefit of their right to self organization, to collective bargaining and otherwise to effectuate the policies of this article, the unit appropriate for the purposes of collective bargaining shall be the employer unit, multiple employer unit, craft unit, plant unit, or any other unit; provided, however, that in any case where the majority of employees of a particular craft shall so decide the board shall designate such craft as a unit appropriate for the purpose of collective bargaining. (As amended by Chapter 518 of the Laws of 1942.)

3. Whenever it is alleged by an employee or his representative, or by an employer or his representative, that there is a question or controversy concerning the representation of employees, the board shall investigate such question or controversy and certify in writing to all persons concerned the name or names of the representatives who have been designated or selected. In any such investigation the board shall provide for an appropriate hearing upon due notice, either in conjunction with a proceeding under section seven hundred six or otherwise, and may conduct an election by secret ballot of employees, or use any other suitable method to ascertain such representatives (either before or after the aforesaid hearing), provided, however, that the board shall not have authority to investigate any question or controversy between individuals or groups within the same labor organization or between labor organizations affiliated with the same parent labor organization. (As amended by Chapter 518 of the Laws of 1942.)

4. The board shall have power to determine who may participate in the election and to establish the rules govern-

ing any such election: Provided, that no election need be directed by the board solely because of the request of an employer or of employees prompted thereto by their employer, nor shall any individuals employed only for the duration of a strike or lockout be eligible to vote in such election; and provided further, that no such election shall be conducted under the employer's supervision, or, except as may be required by the board, on the employer's property, during working hours, or with his participation or assistance. (As amended by Chapter 518 of the Laws of 1942.)

5. If at an election conducted pursuant to this section three or more nominees for exclusive collective bargaining representatives appear on the ballot and no one of them receives a majority of the votes cast at the election, the two nominees who received the highest number of votes shall appear on the ballot of a second election to be conducted hereunder, and the one receiving a majority of the votes cast at the second election shall be the exclusive representative of all the employees in such unit for the purpose of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment.

6. A labor organization nominated as the representative of employees shall be listed by name on the ballots authorized by subdivision three of this section. In any investigation conducted by the board pursuant to this section the board may make a finding as to whether any committee, employee representation plan, or association of employees involved is a company union, and if any such committee, employee representation plan, or association of employees be found to be a company union, it shall not be listed on the ballots, certified or otherwise recognized as eligible to be the representative of employees under this article.

§ 706. *Prevention of unfair labor practices.* 1. The board is empowered and directed, as hereinafter provided, to prevent any employer from engaging in any unfair labor practice. This power shall not be affected or impaired by any means of adjustment, mediation or conciliation in labor disputes that have been or may hereafter be established by law.

2. Whenever a charge has been made that any employer has engaged in or is engaging in any unfair labor practice, the board shall have power to issue and cause to be served upon such employer a complaint stating the charges in that respect and containing a notice of hearing before the board at a place therein fixed to be held not less than seven days after the serving of said complaint. Any such complaint may be amended by the board or its agent conducting the hearing at any time prior to the issuance of an order based thereon. The person so complained of shall have the right to file an answer to the original or amended complaint not less than five days after the service of such original or amended complaint and to appear in person or otherwise to give testimony at the place and time set in the complaint. In the discretion of a member or agent conducting the hearing, or of the board, any other person may be allowed to intervene in the said proceeding and to present testimony. In any such proceeding the board or its agent shall not be bound by technical rules of evidence prevailing in the courts of law or equity.

3. The testimony taken at the hearing shall be reduced to writing and filed with the board. Thereafter, in its discretion, the board upon notice may take further testimony or hear argument. If upon all the testimony taken the board shall determine that the respondent has engaged in or is engaging in any unfair labor practice, the board shall state its findings of fact and shall issue and cause to be served on such respondent an order requiring such respondent to cease and desist from such unfair labor practice, and to take such further affirmative or other action as will effectuate the policies of this article, including, but not limited to (a) withdrawal of recognition from and refraining from bargaining collectively with any employee organization, agency or plan defined in this article as a com ganization or association, agency or plan defined in this article as a company union, or established, maintained or assisted by any action defined in this article as an unfair labor practice; (b) awarding of back pay; (c) reinstatement with or without back pay of any employee discriminated against in violation of section seven hundred four, or main-

tenance of a preferential list from which such employee shall be returned to work; (d) reinstatement with or without back pay of all employees whose work has ceased or whose return to work has been delayed or prevented as the result of the aforementioned or any other unfair labor practice in respect to any employee or employees or maintenance of a preferential list from which such employees shall be returned to work. Such order may further require such person to make reports from time to time showing the extent to which the order has been complied with. If upon all the testimony the board shall be of the opinion that the person or persons named in the complaint have not engaged in or not engaging in any such unfair labor practice, then the board shall make its findings of fact and shall issue an order dismissing the complaint.

4. Until a transcript of the record in a case shall have been filed in a court, as hereinafter provided, the board may at any time, upon reasonable notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any finding or order made or issued by it.

5. The board shall not require as a condition of taking action or issuing any order under this article, that employees on strike or engaged in any other lawful, concerted activity shall discontinue such strike or such activity.

6. The board shall consider all complaints or petitions filed with it and conduct all proceedings under this article with all possible expedition.

§ 707. *Judicial review.* 1. The board shall have power to petition the supreme court of the state within the county wherein the unfair labor practice in question occurred or wherein any person charged with the unfair labor practice resides or transacts business, or if such court be on vacation or in recess, then to the supreme court of any county adjoining the county wherein the unfair labor practice in question occurred or wherein any person charged with the unfair labor practice resides or transacts business, for the enforcement of such order and for appropriate temporary relief of restraining order, and shall certify and file in the court a transcript of the

entire record in the proceeding, including the pleadings and testimony upon which such order was made and the findings and order of the board. Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the board.

2. No objection that has not been urged before the board, its member, agent or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the board as to the facts, if supported by evidence, shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the board, its member, agent, or agency, the court may order such additional evidence to be taken before the board, its member, agent, or agency, and to be made a part of the transcript. The board may modify its finding as to the facts, or make new findings, by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which, if supported by evidence, shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order.

3. The jurisdiction of the supreme court shall be exclusive and its judgment and decree shall be final, except that appeals shall lie to the appellate division of said court and to the court of appeals, in the manner and subject to the limitations provided in the civil practice act irrespective of the nature of the decree or judgment or the amount involved. (As amended by Chapter 210 of the Laws of 1942.)

4. Any person aggrieved by a final order of the board granting or denying in whole or in part the relief sought may obtain a review of such order in the supreme court of the county where the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, by filing in such court a written petition praying that the order of the board be modified or set aside, or if such court be on vacation or in recess, then to the supreme court of any county adjoining the county wherein the unfair labor practice in question occurred or wherein any such person resides or transacts business. A copy of such petition shall be forthwith served upon the board, and thereupon the aggrieved party shall file in the court a transcript of the entire record in the proceeding, certified by the board, including the pleading and testimony and order of the board. Upon such filing, the court shall proceed in the same manner as in the case of an application by the board under section seven hundred six, and shall have the same exclusive jurisdiction to grant to the board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying and enforcing as so modified, or setting aside in whole or in part the order of the board; and the findings of the board as to the facts shall in like manner be conclusive.

5. The commencement of proceedings under subdivisions one and four of this section shall not, unless specifically ordered by the court, operate as a stay of the board's order.

6. When granting appropriate temporary relief or a restraining order, or making and entering a decree enforcing, modifying and enforcing as so modified or setting aside in whole or in part an order of the board, as provided in this section, the jurisdiction of courts sitting in equity shall not be limited by acts pertaining to equity jurisdiction of courts.

7. Petitions filed under this article shall be heard expeditiously and shall be considered and determined upon the transcript filed, without requirement of printing. Upon

the filing of a record in the supreme court, the case shall be heard with greatest possible expedition, and shall take precedence over all other matters except matters of the same character.

§ 708. *Investigatory powers.* For the purpose of all hearings and investigations, which, in the opinion of the board, are necessary and proper for the exercise of the powers vested in it by sections seven hundred five and seven hundred six.

1. The board, or its duly authorized agents or agencies, shall at all reasonable times have access to, for the purposes of examination, and the right to examine, copy or photograph any evidence, including payrolls or lists of employees, of any person being investigated or proceeded against that relates to any matter under investigation or in question. Any member of the board shall have power to issue subpoenas requiring the attendance and testimony of witnesses and the production of any evidence that relates to any matter under investigation or in question before the board, its member, agent, or agency, conducting the hearing or investigation. Any member of the board, or any agent or agency designated by the board for such purposes, may administer oaths and affirmations, examine witnesses, and receive evidence.

2. If any witness resides outside of the state, or through illness or other cause is unable to testify before the board or its member, agent, or agency conducting the hearing or investigation, his or her testimony or deposition may be taken within or without this state, in such manner and in such form as the board or its member, agent or agency conducting the hearing may by special order or general rule, prescribe.

3. In case of contumacy or refusal to obey a subpoena issued to any person the supreme court of any county within the jurisdiction of which the inquiry is carried on or within the jurisdiction of which said person guilty of contumacy or refusal to obey is found or resides or transacts business, upon application by the board shall have jurisdiction to issue to such person an order requiring

such person to appear before the board, its member, agent, or agency, there to produce evidence if so ordered, or there to give testimony touching the matter under investigation or in question; and any failure to obey such order of the court may be punished by said court as a contempt thereof.

4. No person shall be excused from attending and testifying or from producing books, records, correspondence, documents or other evidence in obedience to the subpoena of the board, on the ground that the testimony or evidence required of him may tend to incriminate him or subject him to a penalty or forfeiture; but no individual shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he is compelled, after having claimed his privilege against self-incrimination, to testify or produce evidence, except that such individual so testifying shall not be exempt from prosecution and punishment for perjury committed in so testifying.

5. Complaints, orders, and other process and papers of the board, its member, agent, or agency, may be served either personally or by registered mail or by telegraph or by leaving a copy thereof at the principal office or place of business of the person required to be served. The verified return by the individual so serving the same setting forth the manner of such service shall be proof of the same, and the return post-office receipt or telegraph receipt therefor when registered and mailed or telegraphed as aforesaid shall be proof of service of the same. Witnessess summoned before the board, its member, agent, or agency shall be paid the same fees and mileage that are paid witnesses in the courts of this state, and witnesses whose depositions are taken and the person taking the same shall severally be entitled to the same fees as are paid for like services in the courts of this state.

6. All process of any court to which application may be made under this article may be served in the county wherein the person or persons required to be served reside or may be found.

7. The several departments, commissions, divisions, authorities, boards, bureaus, agencies and officers of the state or any political subdivision or agency thereof, shall furnish the board, upon its request, all records, papers, and information in their possession relating to any matter before the board.

§ 709. *Punitive provision.* Any person who shall wilfully resist, prevent, impede, or interfere with any member of the board or any of its agents or agencies in the performance of duties pursuant to this article, or who shall in any manner interfere with the free exercise by employees of their right to select representatives in an election directed by the board pursuant to section seven hundred and five, shall be punished by a fine of not more than five thousand dollars or by imprisonment for not more than one year, or both.

§ 710. *Public records and proceedings.* Subject to rules and regulations to be made by the board, the complaints, orders and testimony relating to a proceeding instituted by the board under section seven hundred six may be made public records and be made available for inspection or copying. All proceedings pursuant to section seven hundred and six shall be open to the public.

§ 711. *Estimate of annual administrative expenses; how paid.* Prior to the fifteenth day of November of each year, the industrial commissioner shall submit to the director of the budget for his approval an estimated budget of the administrative expenses of the New York state labor relations board for the ensuing fiscal year. All moneys appropriated to the department or the board, for the use of the board, shall be expended and audited in the manner provided for all other expenditures under the supervision of the industrial commissioner.

§ 712. *Repeal of inconsistent provisions.* Insofar as the provisions of this article are inconsistent with the provisions of any other general, special or local law, the provisions of this article shall be controlling.

§ 713. *Limitations.* Nothing in this article shall be construed so as to interfere with, impede or diminish in any way the right of employees to strike or engage in other lawful, concerted activities.

§ 714. *Separability.* If any clause, sentence, paragraph, or part of this article or the application thereof to any person or circumstances, shall, for any reason, be adjudged by a court of competent jurisdiction to be invalid, such judgment shall not affect, impair, or invalidate the remainder of this article, and the application thereof to other person or circumstances, but shall be confined in its operation to the clause, sentence, paragraph, or part thereof directly involved in the controversy in which such judgment shall have been rendered and to the person or circumstances involved. It is hereby declared to be the legislative intent that this article would have been adopted had such invalid provisions not been included.

§ 715. *Application of article.* The provisions of this article shall not apply to the employees of any employer who concedes to and agrees with the board that such employees are subject to and protected by the provisions of the national labor relations act or the federal railway labor act or to employees of the state or of any political or civil subdivision or other agency thereof, or to employees of charitable, educational or religious associations or corporations.

§ 716. *Short title.* 1. This article shall be known and may be cited and referred to as the "New York state labor relations act."

2. The sum of one hundred thousand dollars ($100,000.00), or so much thereof as may be necessary, is hereby appropriated to the department of labor out of any moneys in the state treasury not otherwise appropriated for the expenses of the New York state labor relations board, including personal service, maintenance and operation, in carrying out the provisions of article twenty of the labor law, as added by this act. Such moneys shall be payable

from the treasury on the audit and warrant of the comptroller on vouchers approved in the manner prescribed by law.

3. This act shall take effect July first, nineteen hundred thirty-seven.

APPENDIX B

SUPREME COURT, CHAUTAUQUA COUNTY

THE ALLEGHENY LUDLUM STEEL CORPORATION

against

WILLIAM J. KELLEY AND MYRON LEWIS, Constituting the State Labor Relations Board of the State of New York

Appearances: Moot, Sprague, Marcy & Gulick, Esqs., Attorneys for Plaintiffs; Welles V. Moot, Esq., William H. Eckert, Esq., and William G. Conable, Esq., of Counsel; William E. Grady, Jr., Esq., Attorney for Defendants; Philip Feldblum, Esq., and Norbert M. Phillipps, Esq., of Counsel.

Opinion

HINKLEY, *J.*:

This decision, by agreement of cousel, is not only determinative of defendants' motion to dismiss the complaint under Rules 112 and 113 of the General Rules of Practice but also of the trial of the Equity action itself. There are no disputed questions of fact but only questions of law.

Plaintiff, a Pennsylvania corporation licensed to do business in the State of New York and operating plants in various other states, seeks a declaratory judgment to restrain and enjoin the defendants as the State Labor Relations Board of the State of New York from taking steps to determine a representative of plaintiff's supervisory employees to bargain collectively with plaintiff. Prior to the bringing of the action and on December 30th, 1943, a union of national scope, known as Foreman's Association of America, Allegheny Ludlum Steel Corporation Chapter

No. 58, filed with defendants a petition seeking an investigation by defendants by virtue of Article 20 of the State Labor Law and further asking that the union be certified as the collective bargaining agent or representative of the foremen or supervisors of plaintiff's Dunkirk plant. This must not be confused with the certification by the National Labor Relations Board of the C. I. O. as bargaining agent or representative of the so-called rank and file of plaintiff's employees in the Dunkirk plant. The defendants proceeded with such investigation and while so acting this action was brought. Since the trial of the case an election has been held and a majority of eligible foremen who voted in that election chose the said Foreman's Union Chapter 58 to be their bargaining agent or representative for the purpose of collective bargaining.

Plaintiff contends that the defendants are without jurisdiction to act in the matter. This contention is based upon the fact that the plaintiff is engaged in interstate commerce and that the jurisdiction rests exclusively with the National Labor Relations Board by virtue of the National Labor Relations Act (49 Stat. 449, U. S. Code, Title 29, Chapter 7, U. S. C. A. 151). Plaintiff also contends that if the defendants have jurisdiction under ordinary circumstances that they are not authorized to receive and act upon the petition of the said Foreman's Union because of a definite policy adopted by the National Labor Relations Board decreeing that a unit composed entirely, as this one is, of foremen or those occupying a supervisory position with the Company is not an appropriate unit for collective bargaining.

Defendants contend that they are vested with jurisdiction; that they were required to act; that they are not controlled by any policy of The National Labor Relations Board, and that the Union in question is an appropriate bargaining agent for collective bargaining.

This decision would be easily arrived at were it settled by judicial decisions that The National Labor Relations Board, whether acting or not, covered the whole field of employer and employee relations in industries engaged in interstate commerce. For this plaintiff is almost exclusively engaged in interstate commerce and it cannot be

said by any stretch of the imagination that it is subject to the minimus rule. On the contrary, the law is well settled that defendants have jurisdiction to act when their acts do not conflict with those of The National Labor Relations Board or in the event that the latter Board has taken no steps to accept jurisdiction (Matter of Davega vs. City Radio, etc., 281 N. Y. 13) or unless the intention of Congress is clearly expressed that the Federal Board shall cover the entire field.

Although The National Labor Relations Board has assumed jurisdiction to certify a representative for collective bargaining between plaintiff and the rank and file of plaintiff's employees in the Dunkirk plant, The National Board has never been petitioned by the Foreman's Union involved herein nor by any other similar union or group, asking to be designated as bargaining agent or representative of the plaintiff's Dunkirk plant. Nor has The National Labor Relations Board done any act in relation to collective bargaining by the foremen or supervisors of that plant.

This brings us to the narrow question as to whether the adoption by The National Labor Relations Board of a definite policy to refuse to recognize foremen unions or groups as appropriate bargaining units is controlling upon defendants. This is not, as defendants' counsel contend, the determination by The National Labor Relations Board or the defendants of a question of fact in each individual case. It is a definite policy, broad in its scope, and based upon the definite conclusion of the National Board that such type of unions or groups are not appropriate bargaining agents and should not be recognized. If such policy is controlling upon defendants then it ousts them of any jurisdiction to act in this or any similar case. The Court, at this time, as defendants' counsel contend, is not in a position to review the action of defendants in their administrative capacity. Plaintiff must stand or fall upon its claim that, by reason of a declared policy of a superior board, the defendants are without jurisdiction to act in this case. If defendants are without jurisdiction to act, then there is ample authority for a declaratory judgment. (Section 473, C. P. A.' Dun & Bradstreet, Inc. vs. City of New York,

276 N. Y., 198. Bank of Yorktown vs. N. Y. S. L. R. B., 280 N Y., 673.)

That there is a sharp conflict between the policy of The National Labor Relations Board and that of the defendants is most clear. The view taken by The National Labor Relations Board that it will not lend itself to collective bargaining by foremen unions or groups is clear shown by its language in the Maryland Drydock cases (49 N. L. R. B., 733) and other of its decisions and in the letter of the regional director attached to defendants' moving papers. That the defendants take the opposite view and feel in duty bound to aid foremen unions or groups in collective bargaining is shown by their decision No. 2751 in this case, which decision is attached to defendants' answer.

The Court is not called upon nor does it desire to express its opinion of the logic or reasoning or right or wrong of the conflict of policy of the Federal and State Labor Relations Boards. In the absence of a definite intent of statutory regulation and in the further absence of judicial precedent, the Court cannot properly decree that in this instance the defendants are without jurisdiction to act simply because The National Labor Relations Board would not act under similar circumstances. Nor can the plaintiff arbitrarily refuse to recognize the State Labor Relations Board because it disagrees with the policy of that Board. Under the circumstances of this case, the plaintiff is called upon to co-operate to the fullest extent with the New York State Labor Relations Board and the certified representative of the foreman group or union until such time, if it arises, that the defendants are ousted from jurisdiction by The National Labor Relations Board.

The Court cannot read into the legislation upon labor relations any intent upon the part of Congress to cover the whole field of employer and employee relations in industrial plants engaged in interstate commerce by the act of Congress in creating The National Labor Relations Board. If so, then state action would be precluded. (Napier vs. Atlantic Coast Line, 272 U. S. 605, at 613: Oregon-Washington R. & N. Co. vs. Washington, 270 U. S. 87.) Congress cannot be held to have intended to supersede or suspend the exercise of reserved powers of a State, even when that may be

done, unless and except so far as its purpose to do so is clearly manifested. (Illinois Central R. Co. vs. Public Utilities Com., 245 U. S. 493, 510. Approved in Welch Co. vs. New Hampshire, 306 U. S. 79, 85.)

Here we have, in the language of Chief Justice Stone (Cloverleaf vs. Patterson, 315 U. S. 148 at 170 dissenting opinion) an unexercised discretionary power given by Congress to a Federal Board as a means of regulating interstate commerce, when the full exercise of its authority would conflict with an assertion of the State power. But only in a case where the intention of Congress to give to the Federal Board exclusive control over the entire field is clearly manifested can the power of the State to act be superseded. (N. W. Bell Tel. Co. vs. Ry. Commission, 297 U. S. 471.) In the absence of such clear intention, it cannot be said that the failure of the Federal Board to exercise its full power is in effect a controlling administrative ruling that no further regulation by either Federal or State government is proper or needful.

It follows that defendants' motion to dismiss the plaintiff's complaint under Rules 112 and 113 must be granted and judgment entered in favor of defendants dismissing plaintiff's complaint upon the merits and not as matter of discretion.

Order and judgment may be entered in accordance with this decision, with opportunity to counsel to file requests to find and conclusions of law, if such intention is indicated within a reasonable time.

ALONZO G. HINKLEY,
Justice Supreme Court.

July 27th, 1944.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1946

No. 76

THE ALLEGHENY LUDLUM STEEL CORPORATION,
Appellant,

v.

WILLIAM J. KELLEY ET AL., CONSTITUTING THE STATE LABOR RELATIONS BOARD OF THE STATE OF NEW YORK.

On Appeal from the Supreme Court of the State of New York for the County of Chautauqua.

BRIEF FOR APPELLANT.

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SUBJECT INDEX.

PAGE

I. Opinions Below 1

II. Jurisdiction 2

III. Statement of the Case 3

IV. Assignments of Error 6

V. Summary of Argument 8

VI. Argument 13

Point I. The New York State Labor Relations Act as Here Applied Unconstitutionally Invades the Field Occupied by the National Labor Relations Act ... 13

A. The Power Granted to the National Labor Relations Board to Decide the Unit Appropriate for the Purposes of Collective Bargaining of Employees Engaged in Interstate Commerce Precludes Such a Decision by a State Labor Relations Board 15

B. Even if the Provisions of the New York State Labor Relations Act Did Not Conflict with the Provisions of the National Act, the State Board Could Not Decide the Unit Appropriate for Collective Bargaining 34

PAGE

C. The Provisions of the New York State Labor Relations Act Conflict with the Provisions of the National Act 39

D. The New York State Labor Relations Act Unduly Burdens Interstate Commerce 46

Point II. The Exercise of Jurisdiction by the National Labor Relations Board Precludes Exercise of Jurisdiction by the State Board in This Case 49

A. Exercise of Jurisdiction by the National Board over Interstate Employees in the Same Plant with the Employees Here Involved Is Sufficient to Terminate Any Jurisdiction of the State Board over Such Employees 49

B. The National Board's Declaration of Policy as to Foremen Employed in Interstate Commerce Is Sufficient to Terminate Any Jurisdiction of the State Board over Them 54

Conclusion 57

Appendix A. Relevant Parts of the New York State Labor Relations Act 59

Appendix B. Relevant Parts of the National Labor Relations Act 65

TABLE OF CASES.

PAGE

Adams Express Co. v. Croninger, 226 U. S. 491.... 28
Alabama & Vicksburg Ry. Co. v. Jackson & Eastern Ry. Co., 271 U. S. 244..... 28
Allen-Bradley Local No. 1111 v. Wisconsin Employment Relations Board, 315 U. S. 740..18, 26, 38, 39
Atchison, etc. Ry. Co. v. Railroad Commission of California, 283 U. S. 380..... 38
Charleston etc. Ry. Co. v. Varnville Furniture Co., 237 U. S. 597.....28, 36
Chicago, etc. Ry. Co. v. Hardwick Farmers Elevator Co., 226 U. S. 426..... 28
Cloverleaf Butter Co. v. Patterson, 315 U. S. 148.... .....26, 46, 53
Davega-City Radio v. New York State Labor Relations Board, 281 N. Y. 13..... 34
Dickson v. Uhlmann Grain Co., 288 U. S. 188..... 38
Easton v. Iowa, 188 U. S. 220..... 28
Eichholtz v. Public Service Commission of Missouri, 306 U. S. 268..... 38
Erie R. R. Co. v. People of the State of New York, 233 U. S. 671..... 28
Erie R. R. Co. v. Winfield, 244 U. S. 170.....28, 52
First Iowa Hydro-Electric Cooperative v. Federal Power Commission, 66 S. Ct. 906.....17, 31
Gibbons v. Ogden, 9 Wheat. 1..... 27
Gilvary v. Cuyahoga Valley Ry. Co., 292 U. S. 57..37, 38
Goodrich Co., B. F., Matter of, 65 N.L.R.B. No. 58.. 32
Gulf, etc. Ry. Co. v Hefley, 158 U. S. 98.....28, 45
Hill v. Florida, 325 U. S. 538.....19, 26, 55
Hines v. Davidowitz, 312 U. S. 52..... 28

PAGE

Houston v. Moore, 5 Wheat. 1 ..... 37, 47
Illinois Central R. R. Co. v. State Public Utility Commission of Illinois, 245 U. S. 493 38
Illinois Natural Gas Co. v. Central Illinois Public Service Co., 314 U. S. 498 28
Jerome v. United States, 318 U. S. 101 31
Jones & Laughlin Steel Corp., Matter of, 66 N.L.R.B. No. 51 32
Kelly v. Washington, 302 U. S. 1 38
Lindgren v. United States, 281 U. S. 38 28
Maryland Drydock Co., Matter of, 49 N.L.R.B. 733 ..... 31, 44, 55
May Department Stores Co. v. National Labor Relations Board, 326 U. S. 376 44
Michigan Central Ry. Co. v. Vreeland, 227 U. S. 59 .. 28
Mintz v. Baldwin, 289 U. S. 346 38
Missouri, etc. Ry. Co. v. Haber, 169 U. S. 613 38
Missouri, etc. Ry. Co. v. Harris, 234 U. S. 412 38
Missouri Pacific R. R. Co. v. Porter, 273 U. S. 341 ..... 28, 36
Missouri Pacific R. R. Co. v. Stroud, 267 U. S. 404 .. 28
Missouri Pacific Ry. Co. v. Larabee Flour Mills Co., 211 U. S. 612 38
Morgan's S. S. Co. v. Louisiana Board of Health, 118 U. S. 455 16
Napier v. Atlantic Coast Line R. R. Co., 272 U. S. 605 ..... 24, 52
National Labor Relations Board v. Blount, 131 F. (2d) 585, cert. den. 318 U. S. 791 31
National Labor Relations Board v. Hearst Publications, 322 U. S. 111 ..... 15, 29, 43
National Labor Relations Board v. Jones & Laughlin Steel Corp., 301 U. S. 1 42

PAGE

New York Central etc. R. R. Co. v. Board of Chosen Freeholders of the County of Hudson, 227 U. S. 248 ..... 28, 45
New York Central etc. R. R. Co. v. Tonsellito, 244 U. S. 360 28
New York Central R. R. Co. v. Winfield, 244 U. S. 147 ..... 28, 52
Northern Coal & Dock Co. v. Strand, 278 U. S. 142 .. 28
Northern Pacific Ry. Co. v. State of Washington, 222 U. S. 370 20
Northwestern Bell Tel. Co. v. Nebraska State Railway Commission, 297 U. S. 471 38
Oregon-Washington R. R. & Navigation Co. v. State of Washington, 270 U. S. 87 23
Packard Motor Car Co., Matter of, 61 N.L.R.B. 4, 64 N.L.R.B. 1212 ..... 32, 55
Parker v. Brown, 317 U. S. 341 38
Pennsylvania R. R. Co. v. Public Service Commission, 250 U. S. 566 28
Polish National Alliance v. National Labor Relations Board, 322 U. S. 643 16
Postal Telegraph-Cable Co. v. Warren-Godwin Lumber Co., 251 U. S. 27 28
Prigg v. Commonwealth of Pennsylvania, 16 Pet. 539 27
Public Utilities Commission of Ohio v. United Fuel Gas Co., 317 U. S. 456 33
Reid v. Colorado, 187 U. S. 137 38
St. Louis, etc. Ry. Co. v. Edwards, 227 U. S. 265 ... 28
St. Louis, etc. Ry. Co. v. Seale, 229 U. S. 156 28
Savage v. Jones, 225 U. S. 501 38
Seaboard Air Line Ry. v. Horton, 233 U. S. 492 31
Second Employers' Liability Cases, 223 U. S. 1 22

PAGE
Soss Manufacturing Co., Matter of, 56 N.L.R.B. 348. 31
Southern Ry. Co. v. Railroad Commission of Indiana, 236 U. S. 439 ..... 28, 35
Southern Ry. Co. v. Reid, 222 U. S. 424 21
Standard Dredging Corp. v. Murphy, 319 U. S. 306 .. 38
Supervisory Employees' Union v. Pittsburgh Rys. Co., 93 Pitts. L. J. 47 44
Texas & Pacific Ry. Co. v. Abilene Cotton Oil Co., 204 U. S. 426 31
Texas & Pacific Ry. Co. v. Rigsby, 241 U. S. 33 28
Townsend v. Yeomans, 301 U. S. 441 38
United States v. Hill, 248 U. S. 420 28
United States v. Pelzer, 312 U. S. 399 31
Welch Co. v. New Hampshire, 306 U. S. 79 38
Young Spring & Wire Corp., L. A., Matter of, 65 N.L.R.B. No. 59 32

STATUTES.

Constitution of the United States:
Article I, Section 8, clause 3 ..... 6, 7, 8
Article VI, clause 2 ..... 6, 7, 8
Act of April 29, 1878, 20 Stat. 37 16
Act of February 4, 1887, 24 Stat. 379, as amended 21
Act of March 4, 1907, 34 Stat. 1415 20
Act of April 22, 1908, 35 Stat. 65, as amended ... 52
Act of February 17, 1911, 36 Stat. 913, as amended 24, 52
Act of June 10, 1920, 41 Stat. 1063 16
Act of April 13, 1926, 44 Stat. 250, amending Act of August 20, 1912, 37 Stat. 315 16
Act of March 3, 1927, 44 Stat. 1355 16
Act of June 10, 1930, 46 Stat. 531 16

PAGE

Act of May 27, 1933, 48 Stat. 74 16
Act of June 10, 1933, 48 Stat. 123 16
Act of June 6, 1934, 48 Stat. 881 17
Act of July 5, 1935, 49 Stat. 449 .....
.....6, 7, 8, 9, 13, *et passim.*
Act of June 3, 1937, 50 Stat. 246 38
Act of June 25, 1938, 52 Stat. 1060 17
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Labor Law of New York, Article 20, L. 1937, c. 443, § 1 .....2, 4, 5, 6, 7, 8, 9, 13, *et passim.*

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Congressional Record, 74th Cong., 1st Sess., Vol. 79 41
House Report No. 1371, 74th Cong., 1st Sess..... 40
Senate Report No. 573, 74th Cong., 1st Sess.....15-16, 42

IN THE

Supreme Court of the United States

OCTOBER TERM, 1946

No. 76

THE ALLEGHENY LUDLUM STEEL CORPORATION,
Appellant,

v.

WILLIAM J. KELLEY ET AL., CONSTITUTING THE STATE LABOR RELATIONS BOARD OF THE STATE OF NEW YORK.

On Appeal from the Supreme Court of the State of New York for the County of Chautauqua.

BRIEF FOR APPELLANT.

I.

OPINIONS BELOW.

The opinion delivered on July 27, 1944, in the Supreme Court of the State of New York for the County of Chautauqua is reported in 184 N. Y. Misc. 47.

On appeal, the Appellate Division, Fourth Department, of the Supreme Court of New York affirmed unanimously without opinion on May 2, 1945. Its order is reported in 269 N. Y. App. Div. 805.

On appeal, the Court of Appeals of the State of New York affirmed unanimously without opinion on November 29, 1945. Its order is reported in 295 N. Y. 607.

II.

JURISDICTION.

(a) The statutory provision believed to sustain the jurisdiction is Section 237(a) of the Judicial Code of the United States (U. S. C., Title 28, § 344(a)).

(b) The statute of the State, the validity of which is involved, is the Labor Law of the State of New York, Article 20, L. 1937, c. 443, § 1, as amended, 30 McKinney's Consolidated Laws §§ 700-716, effective May 20, 1937, and particularly Section 705 thereof, providing (inter alia) that the State Labor Relations Board shall decide the unit appropriate for the purposes of collective bargaining and whenever it is alleged by an employee or an employer that there is a question (with an exception not material in this case) concerning the representation of employees, shall investigate such question and certify the name or names of the representatives who have been designated or selected. The validity of the said statute is involved insofar as it applies to employees engaged in interstate commerce. A copy of the said statute is attached hereto as Appendix A.

(c) The date of the judgment sought to be reviewed was November 30, 1945, and the date upon which the application for appeal was presented was February 19, 1946. The appeal was allowed on February 23, 1946.

III.

STATEMENT OF THE CASE.

This is an appeal from a dismissal on the merits by the New York courts of a complaint praying for a declaratory judgment and an injunction.

Appellant is a Pennsylvania corporation registered to do business in the State of New York. It owns steel plants in Brackenridge, Pa., in West Leechburg, Pa., in Dunkirk, N. Y., in Michigan and in California, along with warehouses in various other states (R. 8, 22, 58, 59). Approximately 95%, by value, of the products shipped from its Dunkirk, N. Y., plant are shipped to points outside the State of New York; 86%, by value, of the raw materials used at the plant are brought from points outside the State; and 85%, by value, of partially fabricated materials brought to the plant for further fabrication are from outside the State (R. 10, 22).

It was stipulated that on June 29, 1942, the C.I.O. was certified by the National Labor Relations Board as collective bargaining representative of appellant's employees, other than foremen, employed at appellant's five plants, including plants at Brackenridge and West Leechburg, Pa., and at Dunkirk, N. Y., and a single contract was made covering employees, other than foremen, at these plants (R. 58).

At the time when the complaint was filed the National Labor Relations Board had a definite policy of refusal to certify units composed of foremen or other employees with supervisory duties as appropriate for purposes of collective bargaining, except under circumstances not here present (R. 10-11, 30, 49, 58, 61). The Regional Director of the National Labor Relations Board

at Buffalo, N. Y., being the Board official in charge of the area in which appellant's Dunkirk plant is located, stated in a letter to the Regional Attorney of the New York State Labor Relations Board, dated February 22, 1944, that a petition seeking certification for foremen at appellant's Dunkirk plant as a separate bargaining unit would have been dismissed (R. 45). This policy of the National Labor Relations Board has since been reversed.

Though it conceded that appellant is engaged in interstate commerce (R. 22), on December 30, 1943, Foreman's Association of America, Allegheny Ludlum Steel Corporation Chapter No. 58, filed with appellees, constituting the New York State Labor Relations Board, a petition requesting that the Board investigate a question or controversy existing concerning the representation of foremen at appellant's Dunkirk plant and further requesting that the Board, upon completion of its investigation, certify to the parties the name of the collective bargaining representative selected by such employees, pursuant to the provisions of the New York State Labor Relations Act (R. 15, 20-21). Section 715 of that Act provides that it

> "* * * shall not apply to the employees of any employer who concedes to and agrees with the board that such employees are subject to and protected by the provisions of the national labor relations act * * *."

Appellees refused to agree with appellant that the employees at the Dunkirk Plant were subject to and protected by the provisions of the National Labor Relations Act, and continued to assert jurisdiction of the matters covered by the petition (R. 10, 33). Appellees held hearings and issued a Decision and Direction of Election on May 24, 1944, requiring an election to be held among ap-

pellant's foremen to determine whether they desired to be represented for the purposes of collective bargaining by Foreman's Association of America, Allegheny Ludlum Steel Corporation Chapter No. 58 (R. 16, 20-38).

Before the issuance of appellees' Decision and Direction of Election appellant, on April 14, 1944, commenced this action in the Supreme Court of New York, Chautauqua County, by service of summons and complaint, stating that it was threatened with substantial and irreparable injury and had no adequate remedy at law, and praying that a declaratory judgment be made and entered decreeing (*inter alia*) that appellees had no jurisdiction in the premises and that they be restrained and enjoined from holding or attempting to hold an election or from taking any other action in connection with appellant or its employees under the provisions of the New York State Labor Relations Act (R. 7-14). By order dated October 3, 1944, the complaint was dismissed on the merits and not as a matter of discretion and judgment was accordingly entered for appellees (R. 2-3, 5-6).

On appeal to the Appellate Division, Fourth Department, of the Supreme Court of New York, the judgment was affirmed (R. 65-66). And on appeal to the Court of Appeals of New York it was again affirmed, on November 30, 1945, and the record was remitted to the Supreme Court (R. 67-68). The order and judgment of the Court of Appeals was made the order and judgment of the Supreme Court for the County of Chautauqua on December 26, 1945, and judgment was entered thereon on December 28, 1945 (R. 68-71). The present appeal was then taken. Probable jurisdiction was noted on April 22, 1946 (R. 79).

IV.

ASSIGNMENTS OF ERROR.

Appellant specifies the following errors as those which are intended to be urged:

1. The Court of Appeals of the State of New York erred in affirming the judgment dismissing the complaint upon the merits, for in so doing it held that the laws of the State of New York, and particularly the Labor Law, Article 20, L. 1937, c. 443, § 1, as amended, 30 McKinney's Consolidated Laws §§ 700-716, effective May 20, 1937, gave the appellees jurisdiction to decide the unit appropriate for the purposes of collective bargaining, to investigate a controversy concerning the representation of employees of the appellant, and to certify the name or names of the representatives designated or selected, though the said employees were engaged in interstate commerce and subject to the jurisdiction of the National Labor Relations Board under the provisions of the National Labor Relations Act, 49 Stat. 449, 29 U.S.C. §§ 151-166, approved July 5, 1935. The said Labor Law of New York as so applied is repugnant to Article I, Section 8, clause 3, and Article VI, clause 2, of the Constitution of the United States and to the said National Labor Relations Act, being a regulation of commerce among the several States in violation of a law of the United States regulating such commerce, which is the supreme law of the land.

2. The Court of Appeals of the State of New York erred in affirming the judgment dismissing the complaint upon the merits, for in so doing it held that the laws of the State of New York, and particularly the said Labor Law, gave the appellees jurisdiction to

cide the unit appropriate for the purposes of collective bargaining, to investigate a controversy concerning the representation of employees of the appellant, and to certify the name or names of the representatives designated or selected, though the said employees were engaged in interstate commerce and subject to the jurisdiction of the National Labor Relations Board, which under the provisions of the said National Labor Relations Act had already certified a representative for purposes of collective bargaining for other employees of the appellant at the same plant. The said Labor Law of New York as so applied is repugnant to Article I, Section 8, clause 3, and Article VI, clause 2, of the Constitution of the United States and to the said National Labor Relations Act, being a regulation of commerce among the several States in violation of a law of the United States regulating such commerce, which is the supreme law of the land.

3. The Court of Appeals of the State of New York erred in affirming the judgment dismissing the complaint upon the merits, for in so doing it held that the laws of the State of New York, and particularly the said Labor Law, gave the appellees jurisdiction to decide the unit appropriate for the purposes of collective bargaining, to investigate a controversy concerning the representation of supervisory employees of the appellant, and to certify the name or names of the representatives designated or selected, though the said employees were engaged in interstate commerce and subject to the jurisdiction of the National Labor Relations Board, which under the provisions of the said National Labor Relations Act had already certified a representative for purposes of collective bargaining for other employees of the

appellant at the same plant and had expressed a policy against recognizing supervisory employees as constituting an appropriate collective bargaining unit. The said Labor Law of New York as so applied is repugnant to Article I, Section 8, clause 3, and Article VI, clause 2, of the Constitution of the United States and to the said National Labor Relations Act, being a regulation of commerce among the several States in violation of a law of the United States regulating such commerce, which is the supreme law of the land.

V.

SUMMARY OF ARGUMENT.

I. The New York State Labor Relations Act as here applied unconstitutionally invades the field occupied by the National Labor Relations Act.

A. The foremen employees involved here are engaged in interstate commerce and covered by the provisions of the National Labor Relations Act. The power granted by that act to the National Labor Relations Board to decide the unit appropriate for the purposes of collective bargaining of such employees and to certify the representatives designated for such purposes by the majority of the employees in the unit precludes such a decision and certification by the New York State Labor Relations Board.

Congress has occupied the field of determination of units appropriate for the purposes of collective bargaining of employees in interstate commerce. If Congress had intended that State power over such collective bargaining should continue, it would have so provided in a

saving clause in the National Labor Relations Act. On the contrary, the act provides that the power of the National Labor Relations Board to prevent any unfair labor practice affecting interstate commerce (including the refusal by an employer to bargain collectively with the representative of his employees) "shall be exclusive, and shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, code, law, or otherwise" (§ 10(a)).

The New York statute as applied to interstate commerce employees must be held unconstitutional, because in the matter of certification of bargaining representatives the National Act and the New York Act cannot operate without impinging upon one another.

To effect the policies of the National Labor Relations Act the National Board must have the power to refrain from action as well as the power to act, so that it may decline or may determine to certify representatives for supervisory employees, in either case without being thwarted by State boards or State courts.

The act of usurpation of the authority of the National Board by the State Board in this case cannot be corrected in any other way than by review of the decision of the highest court of New York by this Court.

B. Even if the provisions of the New York State Labor Relations Act did not conflict with the provisions of the National Act, the State Board could not decide the unit appropriate for collective bargaining.

Congress has said that the National Labor Relations Board shall decide in each case the unit appropriate whenever a question affecting interstate commerce

arises concerning the representation of employees. It did not grant power to State boards to do whatever the National Board could or should do.

"Coincidence is as ineffective as opposition" where a State attempts regulation in a field occupied by Congress.

The contention that lack of conflict with existing federal regulation will justify State regulation is based on a misapprehension of certain cases in which Congress had not occupied a field so wide as to preclude the State regulation involved. In the case at bar Congress has laid its hand squarely on the specific matter of the determination of appropriate bargaining units and the certification of bargaining representatives for interstate commerce employees, and the State of New York cannot lay its hand on the identical matter.

C. The provisions of the New York State Labor Relations Act conflict with the provisions of the National Act.

The National Act provides that the National Board shall decide whether the unit appropriate for the purpose of collective bargaining shall be "the employer unit, craft unit, plant unit, or subdivision thereof." The New York Act allows the New York Board to decide whether the unit appropriate shall be any of these units, the multiple employer unit, or any other unit, but provides that in any case where the majority of employees of a particular craft shall so decide the Board *shall* designate such craft as an appropriate unit. Of course the New York Board *cannot*, and the National Board can, designate an employer unit where the employer has plants in another State also, as the appellant has.

The policy of the National Act is to eliminate the causes of obstructions to the free flow of commerce and to mitigate and eliminate such obstructions. The purpose of the New York Act is the protection of the public welfare, prosperity, health and peace of the people of New York.

The fact that the State and National acts leave the determination of appropriate bargaining units to administrative tribunals is a source of conflict between the acts. Such a determination involves the exercise of discretion and administrative strategy. It could not be expected that the two boards would arrive at the same answer to a problem. The decisions of the two boards have in fact conflicted in the very matter of supervisory employees.

D. The subjection of the appellant to State regulation in a matter affecting interstate commerce in which it is subject to regulation and regulated by Act of Congress imposes an undue burden on such commerce.

II. Even if the New York Labor Relations Board had power to decide the unit appropriate for the purposes of collective bargaining of employees engaged in interstate commerce, the exercise of jurisdiction by the National Labor Relations Board precluded the exercise of jurisdiction by the State Board in this case.

A. The C.I.O. is the collective bargaining representative of appellant's employees, other than foremen, employed at its plants in Pennsylvania and New York. Exercise of jurisdiction by the National Board over interstate employees in the same plant with the employees here involved is sufficient to terminate any juris-

diction of the State Board over such employees. This exercise of jurisdiction was an occupation of the field. The National Board cannot determine an appropriate unit for the rank-and-file employees without considering the collective bargaining rights of the foremen. The State Board should not be permitted to tinker with what the National Board has done in the matter, particularly since there is no way in which the National Board may counteract the results of the tinkering.

B. The National Board's declaration of policy as to foremen employed in interstate commerce is sufficient to terminate any jurisdiction of the State Board over them. That declaration of policy was an occupation of the field. When this action was commenced, the policy of the National Board was to refuse to certify representatives of foremen, and its policy was flouted by the New York court. The National Board, by its subsequent reversal of its policy, did not retroactively relinquish its exclusive power in the premises and ratify previous usurpation of that power by the State Board.

VI.

ARGUMENT.

Point I. The New York State Labor Relations Act as Here Applied Unconstitutionally Invades the Field Occupied by the National Labor Relations Act.

There is no dispute as to the fact that the foremen employees involved here are engaged in interstate commerce (R. 8, 10, 22, 58, 59). Nor has it been contended that they are not covered by the provisions of the National Labor Relations Act, 49 Stat. 449, 29 U.S.C. §§ 151-166, Section 9 of which provides in part:

"(a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: *Provided,* That any individual employee or a group of employees shall have the right at any time to present grievances to their employer.

"(b) The Board shall decide in each case whether, in order to insure to employees the full benefit of their right to self-organization and to collective bargaining, and otherwise to effectuate the policies of this Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof.

"(c) Whenever a question affecting commerce arises concerning the representation of employees,

the Board may investigate such controversy and certify to the parties, in writing, the name or names of the representatives that have been designated or selected. In any such investigation, the Board shall provide for an appropriate hearing upon due notice, either in conjunction with a proceeding under section 10 or otherwise, and may take a secret ballot of employees, or utilize any other suitable method to ascertain such representatives."

Yet appellees assert that, because the National Labor Relations Board has not ascertained and certified collective bargaining representatives for the employees here involved, they, as the New York State Labor Relations Board, may investigate, decide what bargaining unit is appropriate, and certify the names of representatives with whom appellant is required to bargain.

We shall undertake to demonstrate that the power granted by the National Labor Relations Act to the National Labor Relations Board to decide the unit appropriate for the purposes of collective bargaining of employees engaged in interstate commerce and to certify the representatives designated for such purposes by the majority of the employees in the unit precludes such a decision by a State labor relations board; that even if the provisions of the New York State Labor Relations Act did not conflict with the provisions of the National Act, the State Board could not decide the unit appropriate for collective bargaining or certify representatives for employees engaged in interstate commerce; and, moreover, that the provisions of the New York Act do conflict with the provisions of the National Act. We maintain that the New York Act under the circumstances

is unconstitutional also as an undue burden on interstate commerce.

A. *The Power Granted to the National Labor Relations Board to Decide the Unit Appropriate for the Purposes of Collective Bargaining of Employees Engaged in Interstate Commerce Precludes Such a Decision by a State Labor Relations Board.*

It cannot be contended that Congress does not have power to occupy the field of collective bargaining for employees in interstate commerce so as to exclude State action in that field. If the National Labor Relations Act specifically stated that the power of the National Labor Relations Board is to be exclusive, it could not be doubted that Congress had occupied the field. It is submitted that where, as here, Congress has given to the National Board the power to decide the unit appropriate for the purposes of collective bargaining of employees in interstate commerce and to certify the representatives of employees in such unit, the States have no power to do the same sort of thing, because Congress has in effect occupied the entire field and indicated that the matter is to be dealt with by the nation, not the States.

In *National Labor Relations Board v. Hearst Publications*, 322 U. S. 111, the Court said, by Mr. Justice Rutledge (p. 123):

> "The Wagner Act is federal legislation, administered by a national agency, intended to solve a national problem on a national scale. Cf. *e. g.*, Sen. Rep. No. 573, 74th Cong., 1st Sess. 2-4."

The report referred to is that of the Committee on Education and Labor, in which Senator Walsh said of the bill (S. 1958) which later became the National Labor Relations Act (p. 19):

> "While this bill of course does not intend to go beyond the constitutional power of Congress, as that power may be marked out by the courts, it seeks the full limit of that power in preventing these unfair labor practices."

To which this Court added in *Polish National Alliance v. National Labor Relations Board,* 322 U. S. 643, speaking by Mr. Justice Frankfurter (p. 647):

> "By that Act, Congress in order to protect interstate commerce from adverse effects of labor disputes has undertaken to regulate all conduct having such consequences that constitutionally it can regulate."

If Congress had intended that State power over collective bargaining by interstate commerce employees should continue after the enactment of the National Labor Relations Act, it would have so provided in a saving clause, as it did, for example, in the Act of April 29, 1878, 20 Stat. 37, quoted in *Morgan's S.S. Co. v. Louisiana Board of Health,* 118 U. S. 455, 465; in § 27 of the Federal Power Act of 1920, 41 Stat. 1063, 1077, 16 U.S.C. § 821; in the Act of April 13, 1926, 44 Stat. 250, amending § 8 of the Plant Quarantine Act of 1912, 37 Stat. 315, 318, 7 U.S.C. § 161; in § 3 of the Act of March 3, 1927, 44 Stat. 1355, 7 U.S.C. § 496; in § 15 of the Perishable Agricultural Commodities Act of 1930, 46 Stat. 531, 537, 7 U.S.C. § 499o; in § 18 of the Securities Act of 1933, 48 Stat. 74, 85, 15 U.S.C. § 77r; in § 7 of the Act of June 10, 1933, 48 Stat. 123, 124, 7 U.S.C. §587; in §28 of the

Securities Exchange Act of 1934, 48 Stat. 881, 903, 15 U.S.C. § 78bb; in § 18 of the Fair Labor Standards Act of 1938, 52 Stat. 1060, 1069, 29 U.S.C. § 218; and in § 50 of the Investment Company Act of 1940, 54 Stat. 789, 846, 15 U.S.C. § 80 a-49. These acts were all cases of exercise by Congress of its power within a field where the States had previously had regulatory power, and to preserve that power Congress thought it necessary expressly to save it. That Congress in the National Labor Relations Act failed to save to the States their regulatory power shows the intention that the States shall be excluded from the field, as the Court, speaking by Mr. Justice Burton, indicated in *First Iowa Hydro-Electric Cooperative v. Federal Power Commission,* 66 S. Ct. 906. In order to preserve the power of the States an Act of Congress must contain an express saving clause, "if the usual rules of supersedure are to be overcome" (p. 917); and "in those fields where rights are not thus 'saved' to the states, Congress is willing to let the supersedure of the state laws by federal legislation take its natural course" *(ibid.)*.

That the power given to the National Board to determine the appropriate bargaining unit and certify bargaining representatives is exclusive of State power is further demonstrated by the provisions of Section 10(a) of the National Labor Relations Act, which provides (29 U.S.C. § 160(a)):

> "The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall be exclusive, and shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, code, law, or otherwise."

One of the unfair labor practices listed in Section 8 is the refusal by an employer "to bargain collectively with the representatives of his employees." Section 9, in turn, is the section here directly involved, providing for the designation of such representatives. Since the National Board, under Section 10(a), has *exclusive* jurisdiction to prevent refusal to bargain with "representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes" (Section 9(a)), who by the terms of the latter section are to be "the exclusive representatives of all the employees in such unit for the purposes of collective bargaining," then the National Board is the only body which can decide what is a "unit appropriate" for such purposes. Within the field of interstate commerce, only the National Board, therefore, can determine bargaining units, certify representatives, and prevent refusal to bargain with such representatives. Congress's scheme leaves no room for regulation of these matters by the States.

In the court below appellees relied upon *Allen-Bradley Local No. 1111 v. Wisconsin Employment Relations Board*, 315 U. S. 740, to sustain their claim that Congress did not supersede the power of the State to designate appropriate units and certify bargaining representatives of interstate employees. That case not only does not support the claim of the appellees; it shows it to be untenable. There the Wisconsin Board ordered a union and its officers and members to cease and desist from mass picketing, threatening employees, obstructing or interfering with factory entrances or the free use of public streets and roads and picketing the homes of employees. This Court, in an opinion by Mr. Justice Douglas, said (p. 749):

"Congress has not made such employee and union conduct as is involved in this case subject to regulation by the federal Board."

The Court added (p. 751):

"If the order of the state Board affected the status of the employees, or if it caused a forfeiture of collective bargaining rights, a distinctly different question would arise."

In the case at bar the "distinctly different question" with regard to the "status of the employees" for purposes of collective bargaining does arise, and the State Board's action directly affects the collective bargaining rights of the employees.

In *Hill v. Florida,* 325 U. S. 538, the question was whether a Florida statute regulating union activities had been applied to the petitioners in a manner which brought it into conflict with the collective bargaining regulations of the National Act. The Florida statute provided that no one should be licensed as a "business agent" of a labor union who had not been a citizen of the United States for more than ten years, who had been convicted of a felony, or who was not a person of good moral character. A "business agent" was defined, *inter alia*, as "any person who shall for a pecuniary or financial consideration act or attempt to act" for a union "in soliciting or receiving from any employer any right or privilege for employees." This Court said, in an opinion by Mr. Justice Black, that the question affecting the status of employees or causing a forfeiture of collective bargaining rights, which was reserved in the Wisconsin case, had now arisen (p. 539). The Court held that the Florida Act was unconstitutional as circumscribing "the 'full freedom' of choice which Congress

said employees should possess" (p. 541) and because the National Act and the Florida Act as there applied could not "move freely within the orbits of their respective purposes without impinging upon one another" (p. 543).

So in the case at bar the New York statute as here applied must be held unconstitutional, because in the matter of certification of bargaining representatives the National Act and the New York Act cannot operate without impinging upon one another.

That the right of a State to regulate interstate commerce in the exercise of its police power ceases when Congress regulates the same subject matter is settled by a long line of decisions of this Court.

The principle which governs as to the effect of the National Labor Relations Act in the case at bar was laid down in *Northern Pacific Ry. Co. v. State of Washington*, 222 U. S. 370, a case involving the Hours of Service Act, where the Court said, in an opinion by Mr. Chief Justice White (pp. 378-379):

> "It is elementary, and such is the doctrine announced by the cases to which the court below referred, that the right of a State to apply its police power for the purpose of regulating interstate commerce, in a case like this, exists only from the silence of Congress on the subject, and ceases when Congress acts on the subject or manifests its purpose to call into play its exclusive power. This being the conceded premise upon which alone the state law could have been made applicable, it results that as the enactment by Congress of the law in question was an assertion of its power, by the fact alone of such manifestation that subject was at once removed

from the sphere of the operation of the authority of the State. To admit the fundamental principle and yet to reason that because Congress chose to make its prohibitions take effect only after a year, the matter with which Congress dealt remained subject to state power, is to cause the act of Congress to destroy itself; that is, to give effect to the will of Congress as embodied in the postponing provision for the purpose of overriding and rendering ineffective the expression of the will of Congress to bring the subject within its control—a manifestation arising from the mere fact of the enactment of the statute."

This case shows clearly the meaning of the term "concurrent power." The States can exercise "concurrent power" in the silence of Congress. When Congress speaks so as to exercise *its* power, the power of the States is cut off as to the field of regulation which Congress has occupied. They can then act only to the extent that Congress preserves their power. If Congress does not save any power in the States, their power is at an end, even though Congress has done no more than occupy the field, without effective regulation. The position of the respondents in the case at bar misconceives the true interpretation of the term "concurrent power."

The principle was laid down again in *Southern Ry. Co. v. Reid*, 222 U. S. 424, with regard to the Interstate Commerce Act. The Court said, in an opinion by Mr. Justice McKenna (pp. 436, 437, 441, 442):

"It is well settled that if the State and Congress have a concurrent power, that of the State is superseded when the power of Congress is exercised. * * *

* * * * * * *

"* * * There is no contention that the Commission has acted, so we must look to the act. Does it, as contended by plaintiff in error, take control of the subject-matter and impose affirmative duties upon the carriers which the State cannot even supplement? In other words, has Congress taken possession of the field?

* * * * * * *

"* * * The question is, Where is the control, in the State or Congress, and has Congress acted? That the control is in Congress we have seen; that it has acted is demonstrated by the provisions of the Interstate Commerce Act to which we have referred. * * *

* * * * * * *

"* * * Manifestly one authority must be paramount, and when it speaks the other must be silent. We can see no middle ground. In so deciding we take no essential power from the States. The balances of the Constitution are only preserved and there is given to the States the power which is the States' and to Congress the power which belongs to Congress."

Again, in the *Second Employers' Liability Cases*, 223 U. S. 1, the Court said by Mr. Justice Van Devanter (pp. 54-55):

"True, prior to the present act the laws of the several States were regarded as determinative of the liability of employers engaged in interstate commerce for injuries received by their employes while engaged in such commerce. But that was because Congress, although empowered to regulate that subject, had not acted thereon, and because the subject is one which falls within the police power of the

States in the absence of action by Congress. *Sherlock v. Alling*, 93 U. S. 99; *Smith v. Alabama*, 124 U. S. 465, 473, 480, 482; *Nashville &c. Railway v. Alabama*, 128 U. S. 96, 99; *Reid v. Colorado*, 187 U. S. 137, 146. The inaction of Congress, however, in no wise affected its power over the subject. *The Lottawanna*, 21 Wall. 558, 581; *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 196, 215. And now that Congress has acted, the laws of the States, in so far as they cover the same field, are superseded, for necessarily that which is not supreme must yield to that which is. *Gulf, Colorado and Santa Fe Railway Co. v. Hefley*, 158 U. S. 98, 104; *Southern Railway Co. v. Reid*, 222 U. S. 424; *Northern Pacific Railway Co. v. Washington*, 222 U. S. 370."

In *Oregon-Washington R. R. & Navigation Co. v. State of Washington*, 270 U. S. 87, an Act of Congress was involved which directed the Secretary of Agriculture to quarantine any State when necessary to prevent the spread of a dangerous plant disease or insect infestation. The State contended that until the Secretary had fixed or refused to fix quarantine lines it could not be said that Congress had occupied the field (p. 88). This contention the Court rejected, saying by Mr. Chief Justice Taft (pp. 102-103):

"Pending the existing legislation of Congress as to quarantine of diseased trees and plants in interstate commerce, the statute of Washington on the subject can not be given application. It is suggested that the States may act in the absence of any action by the Secretary of Agriculture; that it is left to him to allow the States to quarantine, and that if he does not act there is no invalidity in the state action. Such construction as that can not be given

to the federal statute. The obligation to act without respect to the States is put directly upon the Secretary of Agriculture whenever quarantine, in his judgment, is necessary. When he does not act, it must be presumed that it is not necessary. With the federal law in force, state action is illegal and unwarranted."

Where Congress has given to a federal instrumentality the power to act in a particular field, the States can no longer regulate in that field, even though the power granted by Congress has not been exercised.

In *Napier v. Atlantic Coast Line R. R. Co.*, 272 U. S. 605, the question was "whether the Boiler Inspection Act has occupied the field of regulating locomotive equipment used on a highway of interstate commerce, so as to preclude state legislation" (p. 607). The case involved State statutes prescribing an automatic door to the fire-box and a cab curtain and it was assumed that there was "no physical conflict between the devices required by the State and those specifically prescribed by Congress or the Interstate Commerce Commission" (pp. 610-611). The Court nevertheless held that the Boiler Inspection Act conferred upon that commission power to specify the sort of equipment to be used on locomotives and that the State statutes were unconstitutional, saying in an opinion by Mr. Justice Brandeis (pp. 612-613):

"The federal and the state statutes are directed to the same subject—the equipment of locomotives. They operate upon the same object. It is suggested that the power delegated to the Commission has been exerted only in respect to minor changes or additions. But this, if true, is not of legal signifi-

cance. It is also urged that, even if the Commission has power to prescribe an automatic fire-box door and a cab curtain, it has not done so; and that it has made no other requirement inconsistent with the state legislation. This, also, if true, is without legal significance. The fact that the Commission has not seen fit to exercise its authority to the full extent conferred, has no bearing upon the construction of the Act delegating the power. We hold that state legislation is precluded because the Boiler Inspection Act, as we construe it, was intended to occupy the field. The broad scope of the authority conferred upon the Commission leads to that conclusion. Because the standard set by the Commission must prevail, requirements by the States are precluded, however commendable or however different their purpose."

The important thing was that Congress had given the power to the Interstate Commerce Commission, and that this was enough to occupy the field and to preclude State legislation. Failure of the Commission to exercise its authority was of no legal significance. To the contention that the State could act because the Interstate Commerce Commission had not given full protection to railroad employees, the Court replied (p. 613):

"If the protection now afforded by the Commission's rules is deemed inadequate, application for relief must be made to it. The Commission's power is ample."

The analogy to the case at bar is obvious. Here Congress has given the National Labor Relations Board full power to designate units and certify representatives. Congress has occupied the field. If at any time the

National Board's policy is deemed to slight any group of employees, application for a change must be made to it, not to State legislatures or administrative bodies. Failure of the National Board to act does not give the States power to act.

Cloverleaf Butter Co. v. Patterson, 315 U. S. 148, is, with the exception of the *Allen-Bradley* case and *Hill v. Florida*, which have already been discussed (*supra*, pp. 18-20), the latest case in which the Court has dealt at length with the question whether State action in respect of a matter on which Congress has legislated under the commerce clause is superseded by the Act of Congress. The question there involved was a close one, because the practices prohibited by the respective statutes were different, the State statute providing for the inspection and seizure of packing stock butter and the federal statute regulating the manufacture of renovated butter, which is made from packing stock butter. No such difficult question arises in the case at bar, where the regulations in question deal with the identical subject matter, namely, the designation of representatives for collective bargaining. Nevertheless the Court in the *Cloverleaf* case held that the State legislation was superseded, saying, in an opinion by Mr. Justice Reed (p. 169):

> "It is said that the state and the United States have worked cooperatively in protecting consumers from vicious practices in the handling of processed butter; that any action by the state aids the policy of both in disposing of unfit food; and that therefore a harmonious federal-state relationship should not be hampered. Our duty to deal with contradictory functions of state and nation, on any occasion, and particularly when one or the other is challenged by

private interests, calls for the utmost effort to avoid conclusions which interfere with the governmental operations of either. Nothing could be more fertile for discord, however, than a failure to define the boundaries of authority. Clashes may and should be minimized by mutual tolerance; but they are much less likely to happen when each knows the limits of its responsibility. And, it is only reasonable to assume that the theory of denying inconsistent powers to a state is based largely upon the benefits to the regulated industry of freedom from inconsistencies.

"Congress hardly intended the intrusion of another authority during the very preparation of a commodity subject to the surveillance and comprehensive specifications of the Department of Agriculture. To uphold the power of the State of Alabama to condemn the material in the factory, while it was under federal observation and while federal enforcement deemed it wholesome, would not only hamper the administration of the federal act but would be inconsistent with its requirements. Whether the sanction used to enforce the regulation is condemnation of the material or the product is not significant. Since there was federal regulation of the materials and composition of the manufactured article, there could not be similar state regulation of the same subject."

Though we believe that the numerous cases from which we have quoted above are conclusive of the question raised in the case at bar, we may nevertheless add that they are merely illustrative of a large body of authority of which the following cases also are instances: *Gibbons v. Ogden,* 9 Wheat. 1, 209-211; *Prigg v. Com-*

monwealth of Pennsylvania, 16 Pet. 539, 617-618; *Gulf, etc. Ry. Co. v. Hefley*, 158 U. S. 98, 104-105; *Easton v. Iowa*, 188 U. S. 220, 231-232; *Chicago, etc. Ry. Co. v. Hardwick Farmers Elevator Co.*, 226 U. S. 426, 435; *Adams Express Co. v. Croninger*, 226 U. S. 491, 505-507; *Michigan Central R. R. Co. v. Vreeland*, 227 U. S. 59, 66-67; *New York Central etc. R. R. Co. v. Board of Chosen Freeholders of the County of Hudson*, 227 U. S. 248, 264; *St. Louis, etc. Ry. Co. v. Edwards*, 227 U. S. 265, 268-269; *St. Louis, etc. Ry. Co. v. Seale*, 229 U. S. 156, 158; *Erie R. R. Co. v. People of the State of New York*, 233 U. S. 671, 683; *Southern Ry. Co. v. Railroad Commission of Indiana*, 236 U. S. 439, 446-448; *Charleston etc. Ry. Co. v. Varnville Furniture Co.*, 237 U. S. 597, 604; *Texas & Pacific Ry. Co. v. Rigsby*, 241 U. S. 33, 41-42; *New York Central R. R. Co. v. Winfield*, 244 U. S. 147, 148-149; *Erie R. R. Co. v. Winfield*, 244 U. S. 170, 172, 174; *New York Central etc. R. R. Co. v. Tonsellito*, 244 U. S. 360, 362; *United States v. Hill*, 248 U. S. 420, 427; *Pennsylvania R. R. Co. v. Public Service Commission*, 250 U. S. 566, 569; *Postal Telegraph-Cable Co. v. Warren-Godwin Lumber Co.*, 251 U. S. 27, 31; *Missouri Pacific R. R. Co. v. Stroud*, 267 U. S. 404, 408; *Alabama & Vicksburg Ry. Co. v. Jackson & Eastern Ry. Co.*, 271 U. S. 244, 249-250; *Missouri Pacific R. R. Co. v. Porter*, 273 U. S. 341, 345-346; *Northern Coal & Dock Co. v. Strand*, 278 U. S. 142, 147; *Lindgren v. United States*, 281 U. S. 38, 44-47; *Hines v. Davidowitz*, 312 U. S. 52, 66-69; *Illinois Natural Gas Co. v. Central Illinois Public Service Co.*, 314 U. S. 498, 510.

When the action of Congress in occupying a field of regulation cuts off the power of the States to make regulations within the field, even where the State regulations are not in conflict with what Congress has prescribed, or

even where Congress's regulations are not yet in effect, it follows *a fortiori* that when Congress has specifically regulated a particular item in a field the States are precluded from regulation of that particular item. Where Congress has said: "The [National Labor Relations] Board shall decide in each case * * * the unit appropriate for the purposes of collective bargaining," and "Whenever a question affecting commerce arises concerning the representation of employees, the Board may investigate such controversy and certify * * * representatives" (National Labor Relations Act, § 9 (b), (c)), a State cannot arrogate to itself the power to designate appropriate units and certify representatives in the field of interstate commerce.

In *National Labor Relations Board v. Hearst Publications*, 322 U. S. 111, the Court made quite clear that Congress intended the National Act to be the exclusive and controlling legislation in the field of interstate commerce. In holding that federal and not State law determines what constitutes an "employee" under the National Act, the Court said by Mr. Justice Rutledge (p. 123):

> "Persons who might be 'employees' in one state would be 'independent contractors' in another. They would be within or without the statute's protection depending not on whether their situation falls factually within the ambit Congress had in mind, but upon the accidents of the location of their work and the attitude of the particular local jurisdiction in casting doubtful cases one way or the other. Persons working across state lines might fall in one class or the other, possibly both, depending on whether the Board and the courts would be required

to give effect to the law of one state or of the adjoining one, or to that of each in relation to the portion of the work done within its borders.

"Both the terms and the purposes of the statute, as well as the legislative history, show that Congress had in mind no such patchwork plan for securing freedom of employees' organization and of collective bargaining. The Wagner Act is federal legislation, administered by a national agency, intended to solve a national problem on a national scale. Cf. *e.g.*, Sen. Rep. No. 573, 74th Cong., 1st Sess. 2-4. It is an Act, therefore, in reference to which it is not only proper but necessary for us to assume, 'in the absence of a plain indication to the contrary, that Congress * * * is not making the application of the federal act dependent on state law.' *Jerome v. United States,* 318 U. S. 101, 104. Nothing in the statute's background, history, terms or purposes indicates its scope is to be limited by such varying local conceptions, either statutory or judicial, or that it is to be administered in accordance with whatever different standards the respective states may see fit to adopt for the disposition of unrelated, local problems."

If, then, the application of the federal act was not intended by Congress to be dependent on State law, could Congress have intended that State regulation might be applied to the subject matter which the National Act assigns to the National Labor Relations Board? Congress did not wish State law to determine what persons, as "employees," should be permitted to engage in collective bargaining in interstate commerce. No more did it wish State law to determine what units should be considered "appropriate," or what representa-

tives should be certified, for purposes of collective bargaining in interstate commerce. The entire federal statutory program would be impaired if State law could thus control. *Cf. Texas and Pacific Ry. Co. v. Abilene Cotton Oil Co.*, 204 U. S. 426, 441 (Interstate Commerce Act); *Seaboard Air Line Ry. v. Horton*, 233 U. S. 492, 503 (Employers' Liability Act); *United States v. Pelzer*, 312 U. S. 399, 402 (Revenue Act); *Jerome v. United States*, 318 U. S. 101, 104 (Bank Robbery Act); *First Iowa Hydro-Electric Cooperative v. Federal Power Commission*, 66 S. Ct. 906, 911-912 (Federal Power Act); *National Labor Relations Board v. Blount*, 131 F. (2d) 585, 590 (C.C.A., 8th Circ.), cert. den. 318 U. S. 791 (National Labor Relations Act).

It is reasonable and proper that Congress's grant of power to the National Labor Relations Board should cut off the power of the States, as above demonstrated. To effect the policies of the National Labor Relations Act the National Board must have the power to refrain from action as well as the power to act. Its exercise of the power to refrain from action is illustrated by its practice in *Matter of Maryland Drydock Co.*, 49 N. L. R. B. 733. There it declined to certify representatives for supervisory employees, deciding that such employees could not constitute appropriate units for collective bargaining. But nevertheless it claimed jurisdiction over supervisory employees engaged in interstate commerce and held that their status did not remove them from the protection of the National Labor Relations Act: *Matter of Soss Manufacturing Co.*, 56 N.L.R.B. 348. Such was the practice prevailing at the time when the case at bar was commenced. In this particular instance the effect of certification of bargaining representatives by

the State Board was then directly to thwart the National Board's practice and policy.

The National Labor Relations Board in *Matter of Packard Motor Car Co.*, 61 N.L.R.B. 4, 64 N.L.R.B. 1212, and subsequent cases, *Matter of B. F. Goodrich Co.*, 65 N.L.R.B. No. 58, *Matter of L. A. Young Spring & Wire Corp.*, 65 N.L.R.B. No. 59, *Matter of Jones & Laughlin Steel Corp.*, 66 N.L.R.B. No. 51, has reversed its former practice and at present undertakes to certify collective bargaining representatives for units of supervisory employees. This change, made by the Board for the avowed purpose of better effectuating the policies of the National Labor Relations Act, also illustrates the necessity for giving the National Labor Relations Board a free hand, unfettered by interfering State regulation. The National Board must make important decisions on the policy-forming level and then has the burden of putting them into practice. If State boards formed their own policies and were permitted to put them into effect, the National Board would find itself in the embarrassing position of trying to upset in some manner the presumptuous independent determinations of forty-eight conflicting authorities.

If the National Labor Relations Board, for instance, were today to decide that the best method to effectuate the provisions and policies of the National Labor Relations Act was to reverse its present approach and to return to the doctrine of the *Maryland Drydock* decision, what could it do to disestablish bargaining representatives certified by the New York State Labor Relations Board? Congress gave it no specific power to meet such a situation. The answer, of course, is that Congress did not need to provide such power, having given the

National Labor Relations Board *exclusive* power to determine the appropriate unit and to certify representatives for employees in interstate commerce. *Cf. Public Utilities Commission of Ohio v. United Fuel Gas Co.*, 317 U. S. 456, 467-468.

The conclusion to which the courts below came is thus expressed in the only opinion in the case, that of Hinkley, J., in the Supreme Court (R. 62):

> "The Court is not called upon nor does it desire to express its opinion of the logic or reasoning or right or wrong of the conflict of policy of the Federal and State Labor Relations Boards. In the absence of a definite intent of statutory regulation and in the further absence of judicial precedent, the Court cannot properly decree that in this instance the defendants are without jurisdiction to act simply because The National Labor Relations Board would not act under similar circumstances. Nor can the plaintiff arbitrarily refuse to recognize the State Labor Relations Board because it disagrees with the policy of that Board. Under the circumstances of this case, the plaintiff is called upon to co-operate to the fullest extent with the New York State Labor Relations Board and the certified representative of the foreman group or union until such time, if it arises, that the defendants are ousted from jurisdiction by The National Labor Relations Board."

It is submitted that the position so taken is specious. How can the National Board oust the State Board from jurisdiction? The Foreman's Association of America, Allegheny Ludlum Steel Corporation Chapter No. 58, having found that the New York Board would certify

it as a bargaining agent when the National Board would not do so (R. 45), would certainly not seek for a review by the National Board of the decision in its favor even if it could do so, and it cannot do so if it would. The New York State Board, whose decision has been sustained, is not subject to the jurisdiction of the National Board. Its act of usurpation of the authority of that board can be corrected in no other way than by appeal to the New York courts and by review of the decision of the highest court of that State by this Court. The decision of the courts below in favor of the State Board means that that board may act and will act to determine the policy of collective bargaining of interstate commerce employees until this Court puts an end to the usurpation.

B. *Even if the Provisions of the New York State Labor Relations Act Did Not Conflict with the Provisions of the National Act, the State Board Could Not Decide the Unit Appropriate for Collective Bargaining.*

Appellees seek to justify their assumption of jurisdiction in the premises on the ground that the New York State Labor Relations Act and the National Act "are not only alike in their provisions, but are almost identical in their language," quoting from *Davega-City Radio v. New York State Labor Relations Board,* 281 N. Y. 13, 22. Even if this alleged near-identity were a fact, the State Board would still be without power to act here, because Congress in the National Labor Relations Act gave such power to the National Labor Relations Board and not to the State Board.

The argument of the appellees boils down to the assertion that their action is the same as that which would be taken by the National Labor Relations Board and therefore is not in conflict with or in violation of the National Board's jurisdiction. On the same basis could it not just as reasonably be argued that a New York commission could grant licenses to radio broadcasting stations provided it observed all the rules, regulations and policies which guide the Federal Communications Commission in granting licenses? Could the New York taxing authorities collect federal estate and income taxes, following exactly the Treasury Regulations, provided the money collected were all paid into the United States Treasury? Would the Governor and Senate of New York be justified in appointing a judge to fill a vacancy in a United States District Court, provided it could be demonstrated that the appointee was the same man who would have been appointed and confirmed in any case by the President and Senate of the United States?

Congress has said that the National Labor Relations Board "shall decide in each case" the unit appropriate (National Labor Relations Act, § 9(b)), and has given it power to make investigations and to certify bargaining representatives "whenever a question affecting commerce arises concerning the representation of employees" (National Labor Relations Act, § 9(c)). It did not grant power to State boards to do whatever the National Labor Relations Board could or should do.

In *Southern Ry. Co. v. Railroad Commission of Indiana*, 236 U. S. 439, it was contended in support of a State law requiring, under penalty, hand-holds for trainmen on the sides *or* ends of cars that it was not in

conflict with, but rather in aid of, a Federal statute requiring such hand-holds on *both* the sides *and* ends of cars. The Court, speaking by Mr. Justice Lamar, said in rejecting this contention (p. 448):

> "The test, however, is not whether the state legislation is in conflict with the details of the Federal law or supplements it, but whether the State had any jurisdiction of a subject over which Congress had exerted its exclusive control."

In *Charleston etc. Ry. Co. v. Varnville Furniture Co.*, 237 U. S. 597, it was contended that the State statute there involved was "in aid of interstate commerce." The Court, speaking by Mr. Justice Holmes, in holding it invalid, said (p. 604):

> "It is suggested that the act is in aid of interstate commerce. The state law was not contrived in aid of the policy of Congress, but to enforce a state policy differently conceived; and the fine of $50 is enough to constitute a burden. *Southern Ry. v. Reid*, 222 U. S. 424, 443. But that is immaterial. When Congress has taken the particular subject-matter in hand *coincidence is as ineffective as opposition*, and a state law is not to be declared a help because it attempts to go farther than Congress has seen fit to go." (Italics supplied.)

In *Missouri Pacific R. R. Co. v. Porter*, 273 U. S. 341, in which it was held that the Interstate Commerce Act precluded the enforcement of a State law forbidding stipulations in bills of lading exempting carriers from liability for loss by fire, the Court said, in an opinion by Mr. Justice Butler (pp. 345-346):

> "Congress must be deemed to have determined that the rule laid down and the means provided to en-

force it are sufficient and that no other regulation is necessary. Its power to regulate such commerce and all its instrumentalities is supreme; and, as that power has been exerted, state laws have no application. They cannot be applied in coincidence with, as complementary to or as in opposition to, federal enactments which disclose the intention of Congress to enter a field of regulation that is within its jurisdiction. *Napier v. Atlantic Coast Line Ry. Co.*, 272 U. S. 605; *Oregon-Washington Co. v. Washington*, 270 U. S. 87, 102; *Penna. R. R. Co. v. Pub. Service Comm.*, 250 U. S. 566; *Charleston & Car. R. R. Co. v. Varnville Co.*, 237 U. S. 597, 604; *Adams Express Co. v. Croninger*, 226 U. S. 491, 505; *Nor. Pac. Ry. v. Washington*, 222 U. S. 370, 378; *Prigg v. Pennsylvania*, 16 Pet. 539, 617, 618; *Houston v. Moore*, 5 Wheat. 1, 21, 22."

See also *Gilvary v. Cuyahoga Valley Ry. Co.*, 292 U. S. 57, 60-61; and *cf. Houston v. Moore*, 5 Wheat. 1, 23 (*infra*, p. 47).

The fact that "coincidence is as ineffective as opposition" where a State attempts regulation in a field occupied by Congress is implicit also in the decisions in the numerous cases cited in subdivision I-A of this argument (pp. 20-28). Only occasionally and incidentally have the opinions discussed the matter, because it is really too plain for argument in view of the supremacy of the national law: Constitution, Article VI, clause 2. The appellees therefore cannot sustain the New York statute as here applied, as they attempt to do largely, if not entirely, on the ground that coincidence with or subordination to the Act of Congress will avail where opposition to it would fail.

The contention that lack of conflict with existing federal regulation will justify State regulation in circumstances like those here present is doubtless based on a misapprehension of the import of certain cases in this Court. So far as our research has extended, they are the following: *Missouri, etc. Ry. Co. v. Haber,* 169 U. S. 613; *Reid v. Colorado,* 187 U. S. 137; *Missouri Pacific Ry. Co. v. Larabee Flour Mills Co.,* 211 U. S. 612; *Savage v. Jones,* 225 U. S. 501; *Missouri, etc. Ry. Co. v. Harris,* 234 U. S. 412; *Illinois Central R. R. Co. v. State Public Utilities Commission of Illinois,* 245 U. S. 493; *Atchison, etc. Ry. Co. v. Railroad Commission of California,* 283 U. S. 380; *Dickson v. Uhlmann Grain Co.,* 288 U. S. 188; *Mintz v. Baldwin,* 289 U. S. 346; *Gilvary v. Cuyahoga Valley Ry. Co.,* 292 U. S. 57; *Northwestern Bell Tel. Co. v. Nebraska State Railway Commission,* 297 U. S. 471; *Townsend v. Yeomans,* 301 U. S. 441; *Kelly v. Washington,* 302 U. S. 1; *Welch Co. v. New Hampshire,* 306 U. S. 79; *Eichholtz v. Public Service Commission of Missouri,* 306 U. S. 268; *Allen-Bradley Local No. 1111 v. Wisconsin Employment Relations Board,* 315 U. S. 740; *Parker v. Brown,* 317 U. S. 341; *Standard Dredging Corp. v. Murphy,* 319 U. S. 306. Most of these cases have been cited in the briefs for the appellees in the courts below. It is unnecessary to discuss them in detail. *Parker v. Brown* is clearly inapplicable here, because the federal Agricultural Marketing Agreement Act of 1937, which was there involved, "contemplates that its policy may be effectuated by a state program either with or without the promulgation of a federal program" (317 U. S. 341, 354). All the other cases are distinguishable from the case at bar in that the State regulation was upheld by the Court as not in conflict with Congressional regula-

tion because Congress had not occupied a field so wide as to preclude the State regulation involved.

But in the case at bar there can be no question at all as to whether Congress has occupied the field in which the State regulation is claimed to be effective. Congress has laid its hand squarely on the specific matter of the determination of appropriate bargaining units and the certification of bargaining representatives for interstate commerce employees. If the State of New York merely laid its hand on a related matter, a showing of lack of conflict of its regulation with the Congressional regulation might be in point: *cf. Allen-Bradley Local No. 1111 v. Wisconsin Employment Relations Board, supra.* But here cases as to lack of conflict are not relevant. The State of New York could not lay its hand on the matter of the determination of appropriate bargaining units and the certification of bargaining representatives for interstate commerce employees without snatching the matter from under the hand of Congress.

C. *The Provisions of the New York State Labor Relations Act Conflict with the Provisions of the National Act.*

Even if the presence or lack of conflict between the National Labor Relations Act and the New York State Labor Relations Act were relevant and determinative, the State Act could not be applied to interstate commerce employees because of its basic differences from the National Act. There are a number of fundamental conflicts between the acts.

In the first place, the two acts prescribe divergent limits within which the respective boards may determine

appropriate bargaining units. Section 9(b) of the National Labor Relations Act provides:

> "The Board shall decide in each case whether, in order to insure to employees the full benefit of their right to self-organization and to collective bargaining, and otherwise to effectuate the policies of this Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, *or subdivision thereof.*" (Italics supplied.)

Section 705, paragraph 2, of the State Act provides:

> "The board shall decide in each case whether, in order to insure to employees the full benefit of their right to self organization, to collective bargaining and otherwise to effectuate the policies of this article, the unit appropriate for the purposes of collective bargaining shall be the employer unit, *multiple employer unit,* craft unit, plant unit, *or any other unit; provided, however, that in any case where the majority of employees of a particular craft shall so decide the board shall designate such craft as a unit appropriate for the purpose of collective bargaining.*" (Italics supplied.)

It thus appears that the State Board has power to designate multiple employer units as appropriate, or to designate "any other unit." The power granted by Congress to the National Labor Relations Board is not so wide. In fact, the Conference Report (House Report No. 1371) of the Senate and House of Representatives on the bill (S. 1958) which later became the National Labor Relations Act clearly shows that by House Amendment No. 11 the phrase "or other unit" was cut out of § 9(b) for the very reason that it would allow too

wide a choice of types of units: *Congressional Record,* June 27, 1935, 74th Cong., 1st Sess., Vol. 79, Part 9, pp. 10259, 10298-10299.

In another respect, however, the State Board is more circumscribed than the National Board. The latter may determine the proper unit to be "the employer unit, craft unit, plant unit, or subdivision thereof." The State Board, on the other hand, cannot determine that the appropriate unit is *not* a craft unit if a majority of the employees of a particular craft vote for a craft unit.

The most important respect in which the New York State Board is circumscribed in its designation of an appropriate unit lies in its inability to designate an employer unit where the employer also has plants in another state, as in the case at bar. "Employer unit," under the terms of both the State and National acts, is one of the units which may be found to be appropriate. But if the employer's plants are in more than one State, the National Board can, and a State board can *not,* designate an employer unit; for a State board has no jurisdiction as to employees in another State. If the National Board were to certify a unit for appellant's foremen it might be logical for it to constitute the foremen in all plants as an appropriate unit. This the New York Board could not do. It is thus apparent that in the very application of the New York Act which is involved in this case there is a fundamental conflict with the National Labor Relations Act.

A second and even more basic conflict between the two acts lies in the differences in the purposes and policies declared in each of them. These differing policies of the two acts are binding upon the respective boards, and in both acts their effectuation is explicitly

required to be the basis for the decision as to appropriate bargaining unit. The National Labor Relations Act, § 1, states:

> "It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred * * *."

The New York State Labor Relations Act, § 700, declares:

> "This article shall be deemed an exercise of the police power of the state for the protection of the public welfare, prosperity, health and peace of the people of the state."

There may be completely different decisions as to whether a unit is appropriate, depending upon whether the deciding board seeks "to eliminate the causes of certain substantial obstructions to the free flow of commerce" or to protect "the public welfare, prosperity, health and peace of the people" of New York State. The National Act is designed to preserve "the balance of economic forces upon which the full flow of commerce depends": Senate Report No. 573, 74th Cong., 1st Sess., p. 19; *cf. National Labor Relations Board v. Jones & Laughlin Steel Corp.*, 301 U. S. 1, 31-32. Should a small group of employees be dissuaded from industrial strife by granting them bargaining autonomy, in order to prevent local breaches of the peace? Or should this appeasement be refused in order to secure more fully the rights of the mass of the workers whose toil and skill produce the goods which flow in the great stream of commerce among the States and to maintain the proper balance between labor and management? The National

and the State Acts take different approaches, and require different approaches by the two boards. *Cf. National Labor Relations Board v. Hearst Publications,* 322 U. S. 111, 123.

It may be added that, aside from the legislative differences, there must of necessity be a difference in the approach of the two boards by reason of their differing situations alone. The National Labor Relations Board views the problem to be solved from a national standpoint, in the light of experience on a national scale, and with considerations of a national scope in mind. A State board's experience, duty and inclinations do not extend to things which lie beyond the State's borders.

A third source of conflict between the State and National Act lies in the fact that the decisions as to the appropriate unit in each case are left to administrative tribunals. The decision as to what is an appropriate bargaining unit is more than a mere determination of fact. It involves the exercise of discretion. As Mr. Justice Rutledge, delivering the opinion of the Court, said in *National Labor Relations Board v. Hearst Publications,* 322 U. S. 111, at p. 134:

> "Wide variations in the forms of employee self-organization and the complexities of modern industrial organization make difficult the use of inflexible rules as the test of an appropriate unit. Congress was informed of the need for flexibility in shaping the unit to the particular case and accordingly gave the Board wide discretion in the matter. * * * The flexibility which Congress thus permitted has characterized the Board's administration of the section and has led it to resort to a wide variety of

factors in case-to-case determination of the appropriate unit."

Cf. May Department Stores Co. v. National Labor Relations Board, 326 U. S. 376, 380. The determination of an appropriate bargaining unit involves questions of policy which are legislative in their nature. It involves administrative strategy, the revision and constant adaptation of policy in changing circumstances and by reason of changing views as to expediency. To expect two different boards in such a state of facts to work like identical automatic computing machines and produce the same answer to a problem is to expect a most improbable coincidence. That such a coincidence can hardly occur is shown by actual experience in the case at bar. The New York Board's determination that appellant's supervisory employees constituted an appropriate bargaining unit was in the very teeth of the National Board's then current *Maryland Drydock Company* doctrine. At the same time, the State Labor Relations Board in Pennsylvania, where other plants of the appellant are located, was in agreement with the *Maryland Drydock Company* doctrine: *cf. Supervisory Employees' Union v. Pittsburgh Rys. Co.*, 93 Pitts. L. J. 47 (Allegheny County C. P. Ct., 1944). Recognition of regulatory power in the States would create conflict among State rulings as well as between State and national practices.

Finally, there is conflict between the two acts in the very fact that they establish two different boards charged with the duty of determining appropriate bargaining units and certifying bargaining representatives. It has been shown that the two boards must follow different statutory standards, pursue different policies,

and in any event arrive at variant decisions. But the conflict goes even deeper. Congress established a *single* board. When New York sets up *another* board and gives it jurisdiction over the same interstate subject matter, there is an initial and unavoidable conflict. The fundamental conflict lies in the fact that the same jurisdiction is given to each of the two boards.

Gulf, etc. Ry. Co. v. Hefley, 158 U. S. 98, by Mr. Justice Brewer, at p. 105:

> "The state statute and the national law operates upon the same subject-matter, and prescribe different rules concerning it. The national law is unquestionably one within the competency of Congress to enact under the power given to regulate commerce between the States. The state statute must, therefore, give way."

New York Central etc. R. R. Co. v. Board of Chosen Freeholders of the County of Hudson, 227 U. S. 248, by Mr. Chief Justice White, at p. 264:

> "In the absence of an express exclusion of some of the elements of interstate commerce entering into the ferriage, the assertion of power on the part of Congress must be treated as being co-terminous with the authority over the subject as to which the purpose of Congress to take control was manifested. Indeed, this conclusion is inevitable since the assumption of a purpose on the part of Congress to divide its authority over the elements of interstate commerce intermingled in the movement of the regulated interstate ferriage would be to render the national authority inefficacious by the confusion and conflict which would result. The conception of the operation at one and the same time of both the

power of Congress and the power of the States over a matter of interstate commerce is inconceivable, since the exertion of the greater power necessarily takes possession of the field, and leaves nothing upon which the lesser power may operate."

D. *The New York State Labor Relations Act Unduly Burdens Interstate Commerce.*

Before 1789 the States bound heavy burdens and grievous to be borne, and laid them on the shoulders of men engaged in commerce among the States. Doubtless the removal and the prevention of such burdens was, and is, the main purpose of the grant of power to Congress to regulate interstate commerce. When Congress has constitutionally regulated collective bargaining of employees engaged in such commerce, "it is only reasonable to assume that the theory of denying inconsistent powers to a state is based largely upon the benefits to the regulated industry of freedom from inconsistencies": *Cloverleaf Butter Co. v. Patterson*, 315 U. S. 148, by Mr. Justice Rutledge, at p. 169. Further regulation of the same subject matter by the States would impose an intolerable burden upon persons engaged in interstate commerce. No man can serve two masters.

The principle upon which the Court should act in this case was enunciated as long ago as 1820. Acts of Congress authorized the President in certain cases to call forth such number of the militia of the States as he might judge necessary and to issue his orders for that purpose. Every officer or private who should fail to obey the orders of the President was liable to pay a fine to be determined by a court-martial and to be impris-

oned on failure of payment. In *Houston v. Moore,* 5 Wheat. 1, the question arose as to whether it was competent for a court-martial deriving its jurisdiction under State authority to try and to punish militiamen called forth by the President into the service of the United States who had refused or neglected to obey the call. A majority of the Court held the State statute constitutional on a narrow ground which has no application here, but Mr. Justice Washington, delivering the judgment of the Court, said (pp. 22-24):

> "This question does not so much involve a contest for power between the two governments, as the rights and privileges of the citizen, secured to him by the constitution of the United States, the benefit of which he may lawfully claim. If, in a specified case, the people have thought proper to bestow certain powers on congress, as the safest depositary of them, and congress has legislated within the scope of them, the people have reason to complain, that the same powers should be exercised at the same time by the state legislatures. To subject them to the operation of two laws upon the same subject, dictated by distinct wills, particularly in a case inflicting pains and penalties, is, to my apprehension, something very much like oppression, if not worse. In short, I am altogether incapable of comprehending how two distinct wills can, at the same time, be exercised in relation to the same subject, to be effectual, and at the same time, compatible with each other. If they correspond in every respect, then the latter is idle and inoperative; if they differ, they must, in the nature of things, oppose each other, so far as they do differ. If the one imposes a certain punishment, for a certain

offence, the presumption is, that this was deemed sufficient, and, under all circumstances, the only proper one. If the other legislature impose a different punishment, in kind or degree, I am at a loss to conceive, how they can both consist harmoniously together.

"I admit, that a legislative body may, by different laws, impose upon the same person, for the same offence, different and cumulative punishments; but then it is the will of the same body to do so, and the second, equally with the first law, is the will of that body; there is, therefore, and can be, no opposition of wills. But the case is altogether different, where the laws flow from the will of distinct co-ordinate bodies. This course of reasoning is intended as an answer to what I consider a novel and unconstitutional doctrine, that in cases where the state governments have a concurrent power of legislation with the national government, they may legislate upon any subject on which congress has acted, provided the two laws are not in terms, or in their operation, contradictory and repugnant to each other."

Point II. The Exercise of Jurisdiction by the National Labor Relations Board Precludes Exercise of Jurisdiction by the State Board in This Case.

The appellees claim that their power to decide what bargaining unit is appropriate and to certify bargaining representatives subsists in the absence of exercise by the National Labor Relations Board of its power. But if this were so, the appellees would have no jurisdiction here, because the National Board has sufficiently exercised its jurisdiction to terminate whatever temporary jurisdiction the State Board might have had. The National Board has assumed and exercised jurisdiction as to appellant's other employees than supervisory employees in the plant here involved and other plants engaged in interstate commerce; and if this were not enough, it has in addition declared its policy as to the particular type of employees here involved.

A. *Exercise of Jurisdiction by the National Board over Interstate Employees in the Same Plant with the Employees Here Involved Is Sufficient to Terminate Any Jurisdiction of the State Board over Such Employees.*

It is stipulated in this case (R. 58) that the C.I.O. has been certified by the National Labor Relations Board as collective bargaining representative of appellant's employees, other than foremen, employed at its plants in Pennsylvania and New York. This constitutes such exercise of jurisdiction by the National Labor Relations Board as to the supervisory employees here involved

as to cut off the New York State Labor Relations Board's power over them, if it ever had any such power.

Exercise of jurisdiction over all the employees save foremen is an assumption of jurisdiction over the foremen as well. The collective bargaining process is not so simple as to make possible the separate consideration of the bargaining rights of rank-and-file employees and those of their immediate supervisors. The foremen are drawn from the rank and file. At times they may return to the latter group. Pay differentials are perhaps the most important factor involved in the inducement to assume the greater responsibilities resting upon a foreman, so that the wages of the rank and file have a direct bearing on those of the foremen. The National Labor Relations Board cannot determine an appropriate unit for the rank and file without considering the rights and position of the foremen. At least so far as a particular plant is concerned, the status of one part of the employees cannot be considered without consideration of the whole nexus of employer-employee relationships in the plant.

The draftsmen of the National Labor Relations Act recognized this state of affairs. The National Labor Relations Board must decide whether the bargaining unit shall be "the *employer* unit, craft unit, *plant* unit, or *subdivision* thereof" (§9(b)). The Board must therefore consider in every case whether all employees of an employer or all employees in one plant or certain only of the employees of the employer or the employees in one plant shall be grouped in a bargaining unit. When any employees of an employer or at a plant are to be taken under the aegis of the National Labor Relations Board, all other employees, including foremen, must be taken

into consideration in the exercise of the exclusive jurisdiction of that Board.

If the New York Board is allowed to exercise jurisdiction in the case of the foremen at the one plant here involved, there will be a direct and serious encroachment on the field considered by the National Board in the exercise of its jurisdiction with regard to the employees at this plant and other plants of the same employer. The State Board should not be permitted to tinker with what the National Board has done in the given situation, particularly since there is no way by which the National Board may counteract the results of the tinkering. Congress intended that the National Board, not the State Board, should do the job and has provided no method by which the State Board's errors can be corrected by the National Board.

Here is a question as to the extent to which a particular field has been occupied. We submit that the Act of Congress and the action of the National Labor Relations Board establish beyond a doubt that the decision as to the appropriate unit and the certification of representatives for appellant's foremen lie within the field occupied by the Board. The numerous cases as to the occupation of a field of regulation by Congress support our contention that, even if the Act of Congress had not of itself occupied the field as to these foremen, the action of the National Labor Relations Board certainly has done so.

The cases dealing with the extent of occupation of a field of regulation have already been cited and discussed in Point I-A of this brief (pp. 20-28). A discussion of a few of them, however, may be of value in demonstrating that regulation by the National Labor

Relations Board of rank-and-file employees would constitute an occupation of the field of regulation as to foremen in the same plant, even if the grant of power to the Board did not occupy the field.

In *New York Central R. R. Co. v. Winfield,* 244 U. S. 147, and *Erie R. R. Co. v. Winfield,* 244 U. S. 170, the courts of New York and New Jersey, respectively, had held that awards under State workmen's compensation acts could be made to railroad employees in interstate commerce for injuries not attributable to negligence of the carriers. The State commissions and courts took the position that the Employers' Liability Act, permitting recovery against an employer only when it is guilty of negligence, did not invalidate State regulation where the injuries occurred without such negligence. This Court reversed in each case, holding that the federal act was an occupation of the entire field of compensation for injuries to railroad employees in interstate commerce.

If federal occupation of the whole field of compensation for injured employees takes place when Congress allows compensation for injury due to the employer's fault, is it not clear that federal occupation of the field of collective bargaining of employees in a certain plant has taken place when the National Labor Relations Board makes an order certifying representatives of the rank-and-file employees in that plant?

In *Napier v. Atlantic Coast Line R. R. Co.,* 272 U.S. 605, previously discussed (*supra,* pp. 24-25), the contention was made that Congress's occupation, by the Boiler Inspection Act, of the field of train safety devices did not prevent States from requiring the installation of devices such as fire-box doors and cab curtains, which were primarily for the promotion of health and comfort and

affected safety, if at all, only incidentally (p. 612). This contention was rejected. Congress's grant to the Interstate Commerce Commission of power to prescribe safety appliances was held to be an occupation of the entire field of the equipment of locomotives, and if the Commission had not seen fit to exercise its authority to the full extent, State legislation was nevertheless precluded.

If federal occupation of the whole field of equipment of locomotives takes place when Congress grants the Interstate Commerce Commission power to prescribe safety appliances, is it not clear that federal occupation of the field of collective bargaining of employees in a certain plant has taken place when the National Labor Relations Board makes an order certifying representatives of the rank-and-file employees in that plant?

In *Cloverleaf Butter Co. v. Patterson*, 315 U. S. 148, also previously discussed (*supra*, pp. 26-27), the Secretary of Agriculture had power to regulate the manufacture of renovated butter, but no power to confiscate packing stock butter, the material from which renovated butter is produced. The State of Alabama undertook to confiscate spoiled packing stock butter. But this Court held that the prohibition of State action was inferable from the scope and purpose of the federal legislation, and that the Alabama officials should be enjoined. Congress's assumption of jurisdiction over the manufacturing process was sufficient to exclude the States from a related matter over which it had not actively exercised power.

When regulation by Congress of a particular matter constitutes an "occupation of the field" as to more or less directly or indirectly related matters, does not regu-

lation by the National Labor Relations Board of the bargaining status of rank-and-file employees constitute a preemption of the field of regulation of foremen in the same plant? The fixing of the status of one group requires the consideration of the status of the other, and a change in the status of one directly affects the status of the other. Determinations of policy in matters so directly interdependent cannot properly be considered to be in separate fields.

It is reasonable and necessary that a partial exercise of power should constitute a setting apart, for exclusive federal regulation, of other parts of the same field which are inextricably connected with the parts actively regulated. The federal regulations should not be closely fenced in, a limited enclave within the State's regulations. Particularly is this true in a case such as the one at bar, where the success of regulation depends largely upon the ability of the National Labor Relations Board to effectuate its policies by judicious action or inaction. A subsequent change by a State board in the bargaining status of foremen would be an encroachment upon the field preempted by the National Board in its determination of a unit for the rank and file.

B. *The National Board's Declaration of Policy as to Foremen Employed in Interstate Commerce Is Sufficient to Terminate Any Jurisdiction of the State Board over Them.*

Not only has the National Labor Relations Board exercised its jurisdiction to certify bargaining representatives for appellant's employees other than foremen. As to foremen themselves, it has at all times made clear its policy and practice. This, either alone or in connec-

tion with its exercise of jurisdiction as to other employees, is enough to cut off appellees' contended-for power to regulate the bargaining status of appellant's foremen.

As we have seen (*supra*, p. 31), when this action was commenced and when it was decided in the court of first instance the policy of the National Labor Relations Board was to refuse to certify representatives of foremen. In *Matter of Maryland Drydock Co.*, 49 N.L.R.B. 733, 739-741, it was explained that this course was adopted to protect the rights of rank-and-file workers. Later, in *Matter of Packard Motor Car Co.*, 61 N.L.R.B. 4, 64 N.L.R.B 1212, and other cases mentioned above (p. 32), the Board changed its policy. It now undertakes to certify collective bargaining representatives for foremen. Whether the old or the new policy is right it is unnecessary to inquire. The point is that by its declaration of its policy it had asserted jurisdiction in the matter and thereby foreclosed jurisdiction of the New York Board and all other State boards. Of course it is irrelevant that there was no declaration of policy as to the particular representative which prevailed before the New York Board. There could be no such declaration, because no petition had been filed with the National Board by the union which was certified by the New York Board. But the National Board's policy on the subject was nonetheless clear, and it was flouted by the New York court in this case (*supra*, pp. 31-32). Could there be a clearer case of impingement by State action on rights of rank-and-file employees, which at the time were sought to be protected by the National Labor Relations Board, and upon the jurisdiction of that Board in the premises? *Hill v. Florida*,

325 U. S. 538, is authority *a fortiori* for the reversal of the judgment of the court below.

Of course, the National Labor Relations Board's subsequent reversal of its policy with regard to foremen does not weaken in any way the effect of its previous declaration of policy to the contrary. It exercised jurisdiction in the matter of foremen equally by either policy. It did not relinquish its exclusive power in the premises by declaring that thereafter it would recognize units of foremen as appropriate. To contend that it thereby relinquished its power would be to say that by announcing that in future it would elect to act in a certain way it ratified previous usurpations by State boards of its power to act in that way.

The National Labor Relations Board, therefore, had exercised jurisdiction as to appellant's employees here involved and thereby had precluded the exercise of jurisdiction with regard to them by the New York Board even if the National Labor Relations Act had permitted that board to act in the silence of the National Board. The New York Board, therefore, even on the theory of the New York court that it had jurisdiction until ousted therefrom by the exercise of jurisdiction by the National Board, was without constitutional power to certify a bargaining representative for the foremen at the appellant's Dunkirk plant.

Conclusion.

It is submitted that the judgment of the court below should be reversed and the case remanded, with the direction to enter a declaratory judgment that the appellees have no jurisdiction over the appellant or its supervisory employees at its Dunkirk plant; that the appellees may not properly certify the foremen or other supervisory employees at the said plant as an appropriate unit for collective bargaining; that the appellees have no jurisdiction to hold an election for the purpose of determining a representative of the said employees to bargain collectively with the appellant or to order the appellant to bargain collectively with any such representative; and that the appellees be enjoined from holding such an election or taking any other action in connection with the appellant and its employees at the said plant under the provisions of the New York State Labor Relations Act.

Respectfully submitted,

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APPENDIX A.

Relevant Parts of the New York State Labor Relations Act (New York Laws of 1937, Chapter 443, as amended, 30 McKinney's Consolidated Laws of New York §§700-716).

FINDINGS AND POLICY.—SEC. 700. The economic necessity for employees to possess full freedom of association, actual liberty of contract and bargaining power equal to that of their employers, who are frequently organized in corporate or other forms of association, has long been sanctioned by public opinion, and recognized and affirmed by legislatures and the highest courts. As the modern industrial system has progressed, there has developed between and among employees and employers an even greater economic interdependence and community of interest which have become matters of vital public concern. Employers and employees have recognized that the peaceable practice and wholesome development of that relationship and interest are materially aided by the general adoption and advancement of the procedure and practice of bargaining collectively as between equals. It is in the public interest that equality of bargaining power be established and maintained. It is likewise recognized that the denial by some employers of the right of employees freely to organize and the resultant refusal to accept the procedure of collective bargaining, substantially and adversely affect the interest of employees, other employers, and the public in general. Such denial creates variations and instability in competitive wage rates and working conditions within and between industries and between employees and employers engaged in such industries, and by depressing the purchas-

ing power of wage earners and the profits of business, and tends (a) to produce and aggravate recurrent business depressions, (b) to increase the disparity between production and consumption, (c) to create unemployment with its attendant danger to the health, peace and morale of the people, and (d) to increase public and private expenditures for relief of the needy and the unemployed.

When some employers deny the right of employees to full freedom of association and organization, and refuse to recognize the practice and procedure of collective bargaining, their actions lead to strikes, lockouts and other forms of industrial strife and unrest which are inimical to the public safety and welfare, and frequently endanger the public health.

Experience has proved that protection by law of the right of employees to organize and bargain collectively, removes certain recognized sources of industrial strife and unrest, encourages practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours or other working conditions, and tends to restore equality of bargaining power between employers and employees, thereby advancing the interests of employers as well as employees.

In the interpretation and application of this article, and otherwise, it is hereby declared to be the public policy of the state to encourage the practice and procedure of collective bargaining, and to protect employees in the exercise of full freedom of association, self-organization and designation of representatives of their own choosing for the purposes of collective bargaining, or other mutual aid and protection, free from the interference, restraint or coercion of their employers.

All the provisions of this article shall be liberally construed for the accomplishment of this purpose.

This article shall be deemed an exercise of the police power of the state for the protection of the public welfare, prosperity, health and peace of the people of the state.

DEFINITIONS.—SEC. 701. When used in this article:

* * * * * * *

2. The term "employer" includes any person acting on behalf of or in the interest of an employer, directly or indirectly, with or without his knowledge, but a labor organization or any officer or agent thereof shall only be considered an employer with respect to individuals employed by such organization.

3. The term "employees" includes but is not restricted to any individual employed by a labor organization; any individual whose employment has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment; and shall not be limited to the employees of a particular employer, unless the article explicitly states otherwise, but shall not include any individual employed by his parent or spouse or in the domestic service of any person in his home, or any individuals employed only for the duration of a labor dispute, or any individuals employed as farm laborers.

* * * * * * *

RIGHTS OF EMPLOYEES.—SEC. 703. Employees shall have the right of self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in

concerted activities, for the purpose of collective bargaining or other mutual aid or protection, free from interference, restraint, or coercion of employers, but nothing contained in this article shall be interpreted to prohibit employees from exercising the right to confer with their employer at any time, provided that during such conference there is no attempt by the employer, directly or indirectly, to interfere with, restrain or coerce employees in the exercise of the rights guaranteed by this section.

UNFAIR LABOR PRACTICES.—SEC. 704. It shall be an unfair labor practice for an employer:

* * * * * * *

6. To refuse to bargain collectively with the representatives of employees, subject to the provisions of section seven hundred five.

* * * * * * *

REPRESENTATIVES AND ELECTIONS.—SEC. 705. 1. Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes or by the majority of the employees voting in an election conducted pursuant to this section shall be the exclusive representatives of all the employees in the appropriate unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: Provided, that employees, directly or through representatives, shall have the right at any time to present grievances to their employer.

2. The board shall decide in each case whether, in order to insure to employees the full benefit of their right to self organization, to collective bargaining and

otherwise to effectuate the policies of this article, the unit appropriate for the purposes of collective bargaining shall be the employer unit, multiple employer unit, craft unit, plant unit, or any other unit; provided, however, that in any case where the majority of employees of a particular craft shall so decide the board shall designate such craft as a unit appropriate for the purpose of collective bargaining.

3. Whenever it is alleged by an employee or his representative, or by an employer or his representative, that there is a question or controversy concerning the representation of employees, the board shall investigate such question or controversy and certify in writing to all persons concerned the name or names of the representatives who have been designated or selected. In any such investigation the board shall provide for an appropriate hearing upon due notice, either in conjunction with a proceeding under section seven hundred six or otherwise, and may conduct an election by secret ballot of employees, or use any other suitable method to ascertain such representatives (either before or after the aforesaid hearing), provided, however, that the board shall not have authority to investigate any question or controversy between individuals or groups within the same labor organization or between labor organizations affiliated with the same parent labor organization.

* * * * * * *

PREVENTION OF UNFAIR LABOR PRACTICES.—SEC. 706. 1. The board is empowered and directed, as hereinafter provided, to prevent any employer from engaging in any unfair labor practice. This power shall not be affected or impaired by any means of adjustment, media-

tion or conciliation in labor disputes that have been or may hereafter be established by law.

* * * * * * *

APPLICATION OF ARTICLE.—SEC. 715. The provisions of this article shall not apply to the employees of any employer who concedes to and agrees with the board that such employees are subject to and protected by the provisions of the national labor relations act or the federal railway labor act * * * *

APPENDIX B.

Relevant Parts of the National Labor Relations Act (Act of July 5, 1935, 49 Stat. 449, 29 U. S. C. §§151-166).

SECTION 1. The denial by employers of the right of employees to organize and the refusal by employers to accept the procedure of collective bargaining lead to strikes and other forms of industrial strife or unrest, which have the intent or the necessary effect of burdening or obstructing commerce by (a) impairing the efficiency, safety, or operation of the instrumentalities of commerce; (b) occurring in the current of commerce; (c) materially affecting, restraining, or controlling the flow of raw materials or manufactured or processed goods from or into the channels of commerce, or the prices of such materials or goods in commerce; or (d) causing diminution of employment and wages in such volume as substantially to impair or disrupt the market for goods flowing from or into the channels of commerce.

The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association substantially burdens and affects the flow of commerce, and tends to aggravate recurrent business depressions, by depressing wage rates and the purchasing power of wage earners in industry and by preventing the stabilization of competitive wage rates and working conditions within and between industries.

Experience has proved that protection by law of the right of employees to organize and bargain collectively

safeguards commerce from injury, impairment, or interruption, and promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest, by encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions, and by restoring equality of bargaining power between employers and employees.

It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, or the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

* * * * * * *

SEC. 2. When used in this Act—

* * * * * * *

(2) The term "employer" includes any person acting in the interest of an employer, directly or indirectly, but shall not include the United States, or any State or political subdivision thereof, or any person subject to the Railway Labor Act, as amended from time to time, or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization.

(3) The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act explicitly states

otherwise, and shall include any individual whose work has ceased as a consequence of, or in conection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse.

* * * * * * *

(6) The term "commerce" means trade, traffic, commerce, transportation, or communication among the several States, or between the District of Columbia or any Territory of the United States and any State or other Territory, or between any foreign country and any State, Territory, or the District of Columbia, or within the District of Columbia or any Territory, or between points in the same State but through any other State or any territory or the District of Columbia or any foreign country.

(7) The term "affecting commerce" means in commerce, or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce.

* * * * * * *

SEC. 4 (a)

* * * * * * *

The Board may establish or utilize such regional, local, or other agencies, and utilize such voluntary and uncompensated services, as may from time to time be needed.

* * * * * * *

SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection.

SEC. 8. It shall be an unfair labor practice for an employer—

(1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7.

(2) To dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: *Provided,* That subject to rules and regulations made and published by the Board pursuant to section 6 (a), an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay.

(3) By discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided,* That nothing in this Act, or in the National Industrial Recovery Act (U. S. C., Supp. VII, title 15, secs. 701-712), as amended from time to time, or in any code or agreement approved or prescribed thereunder, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in this Act as an unfair labor practice) to require, as a condition of employment, membership therein, if such labor organization is the representative of the employees as provided in section 9 (a), in the appropriate collective bargaining unit covered by such agreement when made.

(4) To discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this Act.

(5) To refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9 (a).

* * * * * * *

SEC. 9. (a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: *Provided*, That any individual employee or a group of employees shall have the right at any time to present grievances to their employer.

(b) The Board shall decide in each case whether, in order to insure to employees the full benefit of their right to self-organization and to collective bargaining, and otherwise to effectuate the policies of this Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof.

(c) Whenever a question affecting commerce arises concerning the representation of employees, the Board may investigate such controversy and certify to the parties, in writing, the name or names of the representatives that have been designated or selected. In any such investigation, the Board shall provide for an appropriate hearing upon due notice, either in conjunction with a proceeding under section 10 or otherwise, and may take a secret ballot of employees, or utilize

any other suitable method to ascertain such representatives.

* * * * * * *

SEC. 10. (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall be exclusive, and shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, code, law, or otherwise.

* * * * * * *

SEC. 14. Wherever the application of the provisions of section 7 (a) of the National Industrial Recovery Act (U. S. C., Supp. VII, title 15, sec. 707 (a)), as amended from time to time, or of section 77B, paragraphs (l) and (m) of the Act approved June 7, 1934, entitled "An Act to amend an Act entitled 'An Act to establish a uniform system of bankruptcy throughout the United States' approved July 1, 1898, and Acts amendatory thereof and supplementary thereto" (48 Stat. 922, pars. (l) and (m)), as amended from time to time, or of Public Resolution Numbered 44, approved June 19, 1934 (48 Stat. 1183), conflicts with the application of the provisions of this Act, this Act shall prevail: *Provided,* That in any situation where the provisions of this Act cannot be validly enforced, the provisions of such other Acts shall remain in full force and effect.

*

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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1946

No. 55

BETHLEHEM STEEL COMPANY, EDWARD F. ENTWISLE, CHAUNCEY L. BAKER, WILLIAM H. PETERS, JR., AND J. DRISCOLL DEWITT, APPELLANTS,

vs.

NEW YORK STATE LABOR RELATIONS BOARD

APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

FILED MARCH 12, 1946.

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INDEX

	Original	Print
Record on appeal to Court of Appeals of New York	1	1
Statement under Rule 234	1	1
Notice of appeal to Appellate Division	2	1
Order appealed from	4	2
Order to show cause for enforcement of subpoenas and subpoena duces tecum	21	19
Petition of New York State Labor Relations Board, read in support of application	23	20
Affidavit of Edward F. Entwisle, read in opposition to application	45	37
Affidavit of Chester A. McLain, read in opposition to application	59	47
Memorandum decision of Mr. Justice Batt	73	59
Clerk's certificate (omitted in printing)	75	
Notice of appeal to Court of Appeals	79	60
Order of affirmance by Appellate Division	81	61
Affidavit of no opinion by Appellate Division	82	61
Clerk's certificate (omitted in printing)	83	

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—5652

	Original	Print
Proceedings in Court of Appeals of New York	84	
Remittitur	84	61
Order amending remittitur	87	63
Petition for appeal, assignments of error and prayer for reversal	89	64
Order allowing appeal	93	67
Citation and service (omitted in printing)	94	
Bond on appeal (omitted in printing)	97	
Praecipe for transcript of record	99	67
Clerk's certificate (omitted in printing)	101	
Statement of points to be relied upon and designation of record	103	69
Order noting probable jurisdiction	105	69

[fol. 1]

IN SUPREME COURT OF NEW YORK, APPELLATE DIVISION, FOURTH DEPARTMENT

In the Matter of the Application of

NEW YORK STATE LABOR RELATIONS BOARD, Petitioner-Respondent,

For an Order

against

BETHLEHEM STEEL COMPANY, EDWARD F. ENTWISLE, Chauncey L. Baker, William H. Peters, Jr., and J. Driscoll Dewitt, Respondents-Appellants

STATEMENT UNDER RULE 234

This proceeding was commenced on February 8, 1945, by service on that date upon the above-named respondents of an order to show cause dated February 7, 1945. Affidavits in opposition to the application of the petitioner pursuant to said order to show cause were served on February 15, 1945.

The full names of the original parties are as set forth above, and there has been no change in the parties.

[fol. 2] IN SUPREME COURT OF NEW YORK, COUNTY OF ERIE

In the Matter of the Application of

NEW YORK STATE LABOR RELATIONS BOARD, Petitioner,

For an Order

against

BETHLEHEM STEEL COMPANY, EDWARD F. ENTWISLE, Chauncey L. Baker, William H. Peters, Jr., and J. Driscoll Dewitt, Respondents.

NOTICE OF APPEAL

SIRS:

Please Take Notice that the respondents above-named hereby appeal to the Appellate Division of the Supreme Court for the Fourth Judicial Department from the order

made in the above-entitled action by Hon. Paul J. Batt and entered in the office of the Clerk of Erie County on or about the 1st day of March, 1945, granting the application of New York State Labor Relations Board, the petitioner herein, and requiring the respondent, Bethlehem Steel Company, to produce certain documents and evidence in a proceeding pending before the New York State Labor Relations Board entitled "In the Matter of Bethlehem Steel Company—and —Foreman's Association of America, Bethlehem Steel Chapter No. 50," and requiring the respondents, Edward F. Entwisle, Chauncey L. Baker, William H. Peters, Jr., and J. Driscoll Dewitt, to appear before a Trial Examiner designated by said petitioner and to testify and give cer-
[fol. 3] tain evidence in said proceeding, all as more specifically set forth in said order, and this appeal is taken from the whole and from each and every part of said order, except the part thereof which grants a stay.

Dated, March 2, 1945.

Yours, etc., Cravath, Swaine & Moore, 15 Broad Street, New York, N. Y. Konefick, Cooke, Mitchell, Bass & Letchworth, Marine Trust Building, Buffalo, N. Y., Attorneys for the Respondents.

To: William E. Grady, Jr., 250 West 57th Street, New York, N. Y., Attorney for the Petitioner. Clerk of the above-named Court.

[fol. 4] In Supreme Court of New York, County of Erie, Special Term, Part I

Present: Hon. Paul J. Batt, Justice

[Same title]

Order Appealed From

The petitioner, New York State Labor Relations Board, having applied for an order directing the respondent, Bethlehem Steel Company to appear and attend before a Trial Examiner of the New York State Labor Relations Board and there produce certain documents, records and other evidence pursuant to a certain subpoena duces tecum issued by said Board to said respondent, dated November 15, 1944, and duly served upon it, and directing the respondents

Edward F. Entwisle, Chauncey L. Baker, William H. Peters, Jr., and J. Driscoll Dewitt to appear and attend before a Trial Examiner of the New York State Labor Relations Board and there testify and give evidence pursuant to certain subpoenas issued by said Board to said respondents, dated November 15, 1944, and duly served upon each of them, and said matter having duly and regularly come on to be heard before this Court,

Now, upon reading and filing the order to show cause made by Mr. Justice Parton Swift, dated February 7, 1945, the petition of the New York State Labor Relations Board duly verified on January 31, 1945, by Rev. William J. Kelley, O. M. I., Chairman thereof, the affidavit of Anne M. [fol. 5] Hanrahan duly sworn to on November 17, 1944, and seven exhibits annexed to the petition, in support of petitioner's application, and the affidavit of Edward F. Entwisle duly sworn to on February 15, 1945, and the affidavit of Chester A. McLain duly sworn to on February 15, 1945, and exhibits annexed to said affidavits in opposition thereto, and after hearing Wiliam E. Grady, Jr., Esq., attorney for the petitioner, by Frank M. Abbate, Esq., of counsel, in support of the application, and Cravath, Swaine & Moore, Esqs., and Kenefick, Cooke, Mitchell, Bass & Letchworth, Esqs., attorneys for the respondents, by Chester A. McLain, Esq., and D. J. Kenefick, Esq., of counsel, in opposition thereto, and the petitioner having withdrawn its application herein in so far as it relates to records concerning non-supervisory skilled, semi-skilled and unskilled employees, and due deliberation having been had thereon, and on filing the decision of the Court, it is, upon motion of William E. Grady, Jr., Esq., attorney for the petitioner,

Ordered, that the application of the petitioner be, and the same hereby is, in all respects granted; and it is further

Ordered, that the respondent Bethlehem Steel Company, by its general manager Edward F. Entwisle, appear and attend before a Trial Examiner of the New York State Labor Relations Board, at Hearing Room Part 4, State Office Building, in the City of Buffalo, State of New York, in the proceeding entitled "In the Matter of Bethlehem Steel Company—and—Foreman's Association of America, Bethelehem Steel Chapter No. 50," on the 27th day of March, 1945, at 10 o'clock in the forenoon of the said day, [fol. 6] and at any adjourned date thereof, there to testify and give evidence in said proceeding now pending before

the said Board and bring and produce at such time and place the following:

> All payroll register sheets, weekly summary sheets for hourly rate employees, semi-monthly sheets for salaried employees, rate record cards, time cards, card of accounts form sheet, payrolls proper and any and all other records, books and memoranda which separately and/or together reflect the weekly, bi-weekly and monthly wages, salaries, bonuses and all other compensation paid to the categories of employees contained in Schedule A annexed hereto, during the month of October, 1944; or in the alternative a verified statement setting forth each of the said categories of employees in said Schedule A and their respective weekly, bi-weekly or monthly wages, salaries, bonuses and all other compensation paid to said categories during the month of October, 1944;

and it is further,

Ordered, that the above named respondents, Edward F. Entwisle, Chauncey L. Baker, William H. Peters, Jr., and J. Driscoll Dewitt, appear and attend before a Trial Examiner of the New York State Labor Relations Board at Hearing Room Part 4, State Office Building, in the City of Buffalo, State of New York, in the proceeding entitled "In the Matter of Bethlehem Steel Company—and—Foreman's Association of America, Bethlehem Steel Chapter No. 50," on the 27th day of March, 1945, at 10 o'clock in the forenoon of said day, and at any adjourned date thereof, there to testify and give evidence in said proceeding now pending before the said Board concerning wages, salaries, bonuses and other compensation paid to the supervisory employees [fol. 7] of the respondent Bethlehem Steel Company in the plants known as the Lackawanna Plant; and it is further

Ordered, that the respondent Bethlehem Steel Company, by its general manager Edward F. Entwisle, attend before said Trial Examiner from day to day with said records until the Trial Examiner shall excuse such attendance, and that the respondents Edward F. Entwisle, Chauncey L. Baker, William H. Peters, Jr., and J. Driscoll Dewitt attend before said Trial Examiner from day to day until said Trial Examiner shall excuse such attendance.

The order herein is stayed for a period of twenty (20) days in order to permit respondents to perfect an appeal to

the Appellate Division of the Supreme Court, Fourth Department, and in the event such an appeal is duly perfected by the respondents within said period then the stay is continued until such appeal is determined by said Appellate Division.

Enter.

Paul J. Batt, J. S. C.

Granted March 1, 1945. Harold E. Rubling, Spec. Dep. Clerk.

SCHEDULE A TO ORDER APPEALED FROM

Coke Oven Division (BA)

Ovens Department	Division Superintendent
	Assistant Division Superintendent
	General Plant Foreman
	General Battery Foreman

[fol. 8]

Ovens Department (Cont.)	Battery Foremen
	Coke Screen Foremen
	Heater Foremen
Shipping Department	Shipping Foreman
By-Product Department	General Foreman
	By-Product Foremen
	Tar Plant Foreman
	Benzol Foreman
	Benzol By-Product Foreman
Electrical Repair Department	Foreman
	Assistant Foreman
Coal Handling Department	Foreman
	Assistant Foreman
Mechanical Maintenance Department	Mechanical Repair Foreman
	Assistant Mechanical Repair Foremen
General Labor Department	Foreman
	Assistant Foreman
Boiler and Booster House	General Foreman
	Foreman
	Chief Clerk

Blast Furnace and Ore Dock Division (BB)

	Division Superintendent
	Assistant Division Superintendent
	Chief Clerk
Furnace Department	General Foreman
	Turn Foreman
	Assistant Turn Foremen
	Stock House Foremen
	Ladle House Foremen
	General Trestle Foreman
	Trestle Foremen
	Blowers

[fol. 9]

General Labor Department	General Foreman
	Pig Machine Foreman
	Turn Labor Foremen
Electrical Maintenance	Electrical Foreman
Gas Cleaning Department	General Gas Foreman
	Turn Foremen (Gas)
Mechanical Department	Master Mechanic
	Repair Foreman
	Assistant Repair Foreman
	Pipe Fitter Foreman
	Turn Foremen
	Ladle Repair Foreman
	(Repair Foreman (Ore Dock))
	Bridge Foreman
	Bridge Turn Foremen
Pig Iron Yard	Shipping Foreman
Ore Dock Department	General Foreman
	Turn Foremen
	Deck Foremen
	Chief Clerk

Open Hearth Division (BC)

General	Division Superintendent
	Scrap Inspection Foreman
	Chief Clerk
Open Hearth No. 1	Superintendent
	Assistant Superintendent
	Melter Foremen
	Melters
	Crane Directors
	Charging Foremen
	Mixer Foremen
	Pit Foremen
	Stock Yard Foremen
	Assistant Stock Yard Foreman

[fol. 10]

Open Hearth No. 1 (Cont.)	General Labor Foreman
	Master Mechanic
	Mech. Turn Foremen
	(Electrical) General Foremen
	Assistant General Foreman (Electrical)
	General Material Foreman (no direct supervision)
	Chief Clerk
Open Hearth No. 2	Superintendent
	Assistant Superintendent
	Melter Foremen
	Melters
	Mixer Foremen
	Charging Foremen
	Pit Foremen
	Stock Yard Foremen
	General Labor Foreman
	Master Mechanic
	Mech. Turn Foremen
	General Electrical Foreman
	Assistant General Electrical Foreman
	Chief Clerk
Open Hearth No. 3	Superintendent
	Assistant Superintendent
	Melter Foremen
	Melters
	Mixer Foremen
	Charging Foremen
	Pit Foremen
	Stock Yard Foremen
	General Labor Foreman
	General Maintenance Foreman
	Master Mechanic
	Mech. Turn Foremen

[fol. 11]

Open Hearth No. 3 (Cont.)	General Electrical Foreman
	Chief Clerk
Mould Yard	General Mould Yard Foreman
	Mould Yard Foremen (No. 1 Open Hearth)
	Mould Yard Foremen (No. 2 Open Hearth)

Rolling Mills Division

General (BGA)	Division Superintendent
	Master Mechanic
	Labor Foreman
	Chief Clerk
Mill No. 1 (44" and 32" Mills) (BG)	Superintendent
	Assistant Superintendent
	Chief Clerk
	Turn Foremen
	Master Mechanic
	Assistant Master Mechanic
	Repair Foreman
	Electrical Maintenance Foreman
	Labor Foreman
	Rollers
	General Finishing End Foreman
	Assistant Finishing End Foreman
	Turn Foremen
	Shipping Foremen
Nos. 2, 12 and 14 Mills (24", 28", and 14" Mills)	Superintendent
	Assistant Superintendent
	Mill Clerk
Maintenance	Mechanical Foreman
	Electrical Foreman

[fol. 12]

Mill No. 14	Turn Foremen
	Finishing End Foreman
	Rollers
Mills Nos. 2 and 12	Turn Foreman
	Rollers
	Labor Foremen
	Roll Build Foremen
Mills Nos. 6, 9 and 10 (12", 10" and 8" Mills)	Superintendent
	Assistant Superintendent
Maintenance	Master Mechanic
	Mechanical Foremen (Mill No. 6)
	Electrical Foremen
Shipping	Shipping Foreman
	Assistant Shippers
Mill No. 6 (12")	General Foreman
	Turn Foremen
	Rollers
	Finishing End Foremen
Mill No. 9 (10")	Turn Foremen
	Rollers
	Finishing End Foremen
Mill No. 10 (8")	Turn Foremen
	Rollers
	Finishing End Foreman
	Bar Finishing Foreman
Mills Nos. 7 and 8 (40" Blooming Mill and 30" and 21" Continuous Mills)	Superintendent
	Assistant Superintendent
	Superintendent's Clerk
	Turn Foremen
Maintenance	Master Mechanic
	Electrical Foreman
	Labor Foreman
Mill No. 8 (30" and 21")	Roller
Shipping	Shipping Foreman

[fol. 13]

54" Blooming Mill and 48" Grey Mills	Superintendent
	Assistant Superintendent
	Turn Foremen
	Master Mechanic
	Mechanical Foreman
	Electrical Foreman
	Labor Foreman
	Rollers (48" Mills)
Structural Shipping Yards (BX)	Superintendent
	Assistant Superintendent
	Chief Clerk
	Chief Schedule Clerk
	Turn Foreman
Maintenance	Master Mechanic
	Electrical Foreman
Shearing and Cold Saw	Foremen
Stocking and Shipping	Foremen (Stocking)
	Foremen (Shipping)
General Billet Yard (BJ and BK)	General Foreman
	Assistant General Foreman
	Chief Clerk
	Yard Foreman (General Billet Yard)
	Turn Foreman (New Billet Yard)
Splice Bar and Tie Plate Depf. (BO)	General Foreman
	Shipping Foreman
	Turn Foreman

Strip Mill Division (BS)

General	Division Superintendent
	Assistant to Division Superintendent
	Chief Clerk

[fol. 14]

Hot Mill	Superintendent
	Assistant Superintendent
	Slab Yard General Foreman
	Slab Yard Assistant General Foreman
	Slab Yard Assistant Foremen
	Heating Foremen
	Hot Mill Turn Foremen
	Rollers
	General Finishing Foreman
	Assistant General Finishing Foreman
	Floor Foremen (Sheet Finishing)
	Floor Foremen (Plate Finishing)
	Chief Shipper (Sheets and Plates)
	Assistant Chief Shipper (Sheets and Plates)
	Turn Shipper (Sheets and Plates)
Cold Mill	Superintendent
	Assistant Superintendent
	General Foremen
	Continuous Pickling Foreman
	Pickler Turn Foremen
	Hot Coil Shipping Foremen
	Rotary Shear Foreman
	Head Annealing Foremen
	Turn Annealing Foremen
	Assistant General Finishing Foreman
	Chief Shipper

[fol. 15]

Cold Mill (Cont.)	Assistant Chief Shipper
	Shipping Turn Foremen
	Bundler Foremen
Mechanical, Electrical and Labor Department for Hot and Cold Mills	Master Mechanic and Chief Electrician
	Assistant Master Mechanic
	Machine Shop Foreman
	Electrical Foreman (Hot Mill)
	Electrical Foreman (Cold Mill)
	Chief Motor Room Operator (Hot Mill)
	Mechanical Foreman (Hot Mill)
	Mechanical Turn Foreman (Hot Mill)
	Mechanical Foreman (Cold Mill)
	Mechanical Turn Foreman (Cold Mill)
	General Labor Foreman
	Labor Foreman (Hot Mill)
	Labor Foreman (Cold Mill)

Mechanical Division

General	Division Superintendent
	Assistant Division Superintendent
	Night Superintendent
	Construction Foreman
	Chief Clerk
Brickmasons	General Foreman
	Assistant General Foreman
	Brickshed Foreman
	Turn Foremen (Bricklayers)

[fol. 16]

Brickmasons (Cont.)	Bricklayer Gang Leaders
	General Labor Foreman
	Turn Labor Foreman
Mechanical Repair (Outside)	General Foreman Riggers
	General Foreman Pipe Shop
	General Foreman Carpenter and Paint Shop
	Assistant General Foreman Carpenter and Paint Shop
Mechanical Repair (Inside)	Foreman Machine Shop
	Assistant Foreman Machine Shop
	Foreman Forge Shop
	Foreman Tool Shop
	Foreman Locomotive Repair
	Foreman Scale Inspector
Boiler and Structural Repair	Foreman Boiler and Structural Repair
	Assistant Foreman Plate Structural Repair
	Assistant Foreman Boiler Structural Repair
	Welder Foreman Plate & Structural Repair
Pattern Shop	Foreman
	Assistant Foreman
Steam, Water and Air	General Foreman Boiler Houses
	Assistant General Foremen (Boilers)
	Turn Foremen (Boilers)

[fol. 17]

Steam, Water and Air (Cont.)	Turn Foreman (Water Purification)
	Turn Foreman (Repairs)
	General Foreman (Power)
	Assistant General Foreman
Narrow Gauge Locomotive	General Foreman
	Assistant General Foreman
	Foremen
Car Repair	General Foreman
	Assistant General Foreman
Foundry	General Foreman
	Assistant General Foreman
	Iron and Steel Foreman
	Core Room Foreman
	Chief Clerk
	Yard Division (CB)
General	Division Superintendent
	Assistant Division Superintendent
	Blasting Foreman
	Reclaiming Foreman
	Locomotive Crane Foreman
	General Foreman
	Foreman
	Gang Foremen
	Chief Clerk
	Roll Division
General	Division Superintendent
	Assistant Division Superintendent

[fol. 18]

Main Shop	Foreman
	Turn Foreman
Merchant Mills	Foreman
	Assistant Foreman
	Turn Foreman
#15 Mill	Foreman
	Assistant Foreman
Strip Mill	Foreman
	Assistant Foreman

Electrical Division (CF)

General	Division Superintendent
	Assistant Division Superintendent
Electrical Shop—Motor and Control Division	Shop Foreman
Maintenance—Wiring Repairs and Construction	Wire Foreman
	Assistant Wire Foreman
Engineering, Drafting, Power, etc.	General Foreman
	Assistant Power Foreman
Crane Repair	Crane Foreman
Mechanical Shop Repair	Mechanical Foreman
Night Maintenance	Night Foreman
Mill Drives and Maintenance	Electrical Foreman
	Assistant Electrical Foreman

Fabricated Steel Construction Department

General	Division Superintendent
	Assistant Division Superintendent
	General Shop Foreman

[fol. 19]

Receiving and Shipping	Shipping Foreman
Shop	Shop Foreman
Maintenance	Electrical Foreman

Building and Highway Specialty Division (GA)

General	Division Superintendent
	Assistant Division Superintendent
	Assistant Engineer
Bar Department	General Foreman
	Turn Foreman
Joist Department	General Foreman
	Turn Foremen
Specialty Department	General Foreman
	Assistant General Foremen
	Turn Foremen
	Foremen
Column Form Department	General Foreman
Mechanical Department	General Foreman
	Turn Foremen

Metallurgical and Inspection Division (DF)

	Engineer of Tests
	Assistant Engineer of Tests
Chemical Laboratories	Chief Chemist
	Assistant Chief Chemist
	General Foreman
	Foremen Chemists

[fol. 20]

Chemical Laboratories (Cont.)	Chief Chemist (Coke Oven Laboratory)
	Assistant Chief Chemist
	Spectographer
	Assistant Spectographer
Mill Inspection Department	Chief Inspector
	Assistant Chief Inspector
Physical Testing Laboratory	Foreman
	Test Foreman
Bar Mills	Foreman Inspector
	Assistant Foremen Inspectors
Billet Yard	Foreman Inspector
Structural Shipping Yards	Foremen Inspectors
Specialty Shop	Spark Test Foreman
	Foreman Inspectors
Metallurgical Department	Chief Metallurgist
	Process Metallurgist
	Observation Foremen
Strip and Sheet Mills Hot Mill	Metallurgist
	Assistant Metallurgist
	Chief Inspector
	Turn Foremen Inspectors
Cold Mill	Assistant Metallurgist
	Chief Inspector

Order Division (AH)

	Division Superintendent
	Assistant Division Superintendent
	Assistant to Superintendent

[fol. 21]

	Chief Clerks
	Chief Steel Distributor
	Chief Mill Provider
	Chief Shipper
	Chief Biller

In Supreme Court of New York, County of Erie

[Same title]

Order to Show Cause for Enforcement of Subpoenas and Subpoena Duces Tecum

Upon the annexed petition of the New York State Labor Relations Board, duly verified the 31st day of January, 1945, by the Rev. William J. Kelley, O.M.I., Chairman thereof, the subpoenas and subpoena duces tecum, duly issued and served by the Board on the 15th day of November, 1944, and the affidavit of service thereof by Anne M. Hanrahan, duly sworn to on the 17th day of November, 1944.

Let, the Bethlehem Steel Company, Edward F. Entwisle, Chauncey L. Baker, William H. Peters, Jr., and J. Driscoll Dewitt show cause before this Court at a Special Term, Part I thereof, appointed to be held in and for the County of Erie at the County Courthouse, located on Franklin Street in the City of Buffalo, New York, on the 16th day of February, 1945, at ten o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard, why an Order should not be made and entered by this Court in accordance [fol. 22] with the provisions of Section 708, subdivision 3, of the New York State Labor Relations Act, requiring the respondent, Bethlehem Steel Company, to produce the documents and evidence as required by the said subpoena duces tecum duly served upon it on the 15th day of November, 1944, and why the respondents, Edward F. Entwisle, Chauncey L. Baker, William H. Peters, Jr., and J. Driscoll Dewitt, should not appear and attend before a trial examiner designated by the New York State Labor Relations Board, testify and give evidence pursuant to subpoenas duly served upon them on the 15th day of November, 1944, in a proceeding pending before the New York State Labor Relations Board entitled "In the Matter of Bethlehem Steel Company and Foreman's Association of America, Bethlehem Steel Chapter No. 50", and requiring the respondents to comply in all respects with the said subpoenas and subpoena duces tecum, and for such other, further, and different relief as to this Court may seem just and proper.

Sufficient reason appearing therefor, let service of a copy of this Order to Show Cause, together with the petition on which it is granted, on the respondents, Bethlehem Steel

Company, Edward F. Entwisle, Chauncey L. Baker, William H. Peters, Jr., and J. Driscoll Dewitt, on or before the 8th day of February, 1945, be good and sufficient service.

Dated: Buffalo, N. Y., February 7th, 1945.

Parton Swift, Justice of the Supreme Court of the State of New York.

[fol. 23] IN SUPREME COURT OF NEW YORK, COUNTY OF ERIE

[Same title]

PETITION FOR ENFORCEMENT OF SUBPOENAS AND SUBPOENA DUCES TECUM, READ IN SUPPORT OF APPLICATION

To the Supreme Court of the State of New York, County of Erie:

The New York State Labor Relations Board (hereinafter referred to as the Board), by Rev. William J. Kelley, O.M.I., Chairman thereof, pursuant to the authority conferred upon it by an Act of the Legislature of the State of New York, known as the New York State Labor Relations Act, Article 20 of the Labor Law as amended (hereinafter referred to as the Act), respectfully petitions this Honorable Court for an Order in accordance with Section 708, subdivision 3, of the Act, directing respondents, Bethlehem Steel Company, Edward F. Entwisle, Chauncey L. Baker, William H. Peters, Jr., and J. Driscoll Dewitt, to appear and attend before a trial examiner of the Board, and bring with them, and produce before said trial examiner the documents and evidence required by a certain subpoena duces tecum, and to testify and give evidence before said trial examiner as required by certain subpoenas, said subpoenas and subpoena duces tecum are hereto annexed and marked "Exhibits A and B", being duly issued and served by the Board upon the respondents in a proceeding pending before the Board entitled "In the Matter of Bethlehem Steel Company—and—Foreman's Association of [fol. 24] America, Bethlehem Steel Chapter No. 50", the

same being Case No. WE-379 upon the records of the Board.

In support of its petition, the Board respectfully shows:

The Respondents

1. The respondent, Bethlehem Steel Company, is a corporation organized under the laws of the State of Pennsylvania, and licensed to do business in New York State. The instant case involves only the company's division at Lackawanna and Buffalo, New York, commonly and herein referred to as the Lackawanna Plant.

2. The respondent, Edward F. Entwisle, is employed by the Bethlehem Steel Company at the said Lackawanna Plant as its General Manager; Chauncey L. Baker as head of the Industrial Relations Department; William H. Peters, Jr., as Works Accountant; and J. Driscoll Dewitt as Supervisor of the Employment Department.

The Proceeding Pending Before the Board

3. A proceeding for investigation and certification of collective bargaining representative of certain employees of the respondents, under Section 705 of the Act, is pending before the Board. The proceeding was initiated by a petition filed with the Board on the 24th day of August, 1944, by the Foreman's Association of America, Bethlehem Steel Chapter No. 50. An amended petition was filed with the Board by said union on the 20th day of October, 1944.

4. The union's amended petition alleges that certain employees of the respondents constitute a unit appropriate [fol. 25] for the purposes of collective bargaining; that it represents the employees in the alleged unit; and that the respondents have refused to recognize and bargain with the union as the collective bargaining representative of the said employees.

5. The unit, which the union alleged is appropriate for the purposes of collective bargaining, consists of all the foremen, general foremen, and supervisors, exclusive of superintendents, employed by the Bethlehem Steel Company at the said Lackawanna Plant.

6. On the 23rd day of October, 1944, the Board duly issued and served its notice of hearing, scheduling a hearing

to be held on the 1st day of November, 1944, at the State Office Building, Buffalo, New York. Said hearing was subsequently adjourned, at the request of respondent, Bethlehem Steel Company, to the 9th day of November, 1944.

7. Pursuant to said notice, hearings were held on the 9th, 10th, 11th, 24th and 25th days of November, 1944, at the State Office Building, Buffalo, New York, before I. L. Broadwin, Esq., a trial examiner duly designated by the Board. On the 25th day of November, 1944, the said trial examiner adjourned the hearing sine die.

8. The Board, under Section 705 of the Act, must determine in each case whether the unit, which the petitioning union seeks to represent, or some other unit, is appropriate for the purposes of collective bargaining, and the eligibility of the employees to vote in any election the Board may conduct.

[fol. 26] The Subpoenas Disobeyed

9. In order to determine whether the unit requested, or some other unit, is appropriate for the purpose of collective bargaining the Board, pursuant to its power under Section 708 of the Act, issued subpoenas and a subpoena duces tecum to the respondents on the 15th day of November, 1944, the originals thereof are annexed hereto, made a part hereof, and marked "Exhibits A and B." The subpoena duces tecum, duly served on the Bethlehem Steel Company, by the General Manager of the said Lackawanna Plant, called for all payroll register sheets, weekly summary sheets for hourly-rate employees, semi-monthly sheets for salaried employees, rate record cards, time cards, card of accounts form sheet, payrolls proper, and any and all other records, books and memoranda which separately and/or together reflect the weekly, bi-weekly and monthly wages, salaries, bonuses, and all other compensation paid to all categories of employees at the said Lackawanna Plant during the month of October, 1944, which records would show the different wage levels and the number of employees and classifications of said employees which may be included within, or excluded from, the appropriate bargaining unit. The subpoenas, duly served on the respondents, Edward F. Entwisle, Chauncey L. Baker, William H. Peters, Jr., and J. Driscoll Dewitt, required them to

appear and attend before the said trial examiner, testify and give evidence in the proceeding pending before the Board. These subpoenas and subpoena duces tecum were return-
[fol. 27] able before the said trial examiner on the 24th day of November, 1944.

10. The subpoenas and subpoena duces tecum were served upon the respondents by registered mail on the 15th day of November, 1944. The return receipts, which are annexed hereto, made a part hereof, and marked "Exhibits C and D", show that the subpoenas and subpoena duces tecum were delivered on the 17th day of November, 1944. Accompanying the duplicate subpoenas and subpoena duces tecum served upon each respondent were United States Post Office money orders, four for $2.10 and one for $2.60, as witness fees for one day's attendance and mileage. The original receipts for these money orders, issued by the United States Government at Columbus Circle Post Office Station, 10 West 60th Street, New York, New York, bearing numbers 75969, 75968, 75966, 75967 and 75965, are annexed hereto, made a part hereof, and marked "Exhibits E and F." Annexed hereto, made a part hereof, and marked "Exhibit G", is the affidavit of service of said subpoenas, subpoena duces tecum and fees made by Anne M. Hanrahan, duly sworn to on the 17th day of November, 1944. The Court's attention is respectfully referred to Section 708, subdivision 5, of the Act, which provides for service of Board process by registered mail, and provides further that the return receipt shall be proof of service. At the hearing before the said trial examiner, held on November 24, 1944, counsel for the respondents conceded on the record that these subpoenas and subpoena duces tecum were duly served and that the fees had been paid.

[fol. 28] 11. At the hearing before the said trial examiner, the respondent, Bethlehem Steel Company, failed and refused to produce certain payroll records, covering the employees at said Lackawanna Plant, called for by the subpoena duces tecum, and the respondents, Edward F. Entwisle, Chauncey L. Baker, William H. Peters, Jr., and J. Driscoll Dewitt, despite subpoenas duly served upon them, failed and refused to testify and answer certain questions of the said trial examiner concerning the wages, salaries, bonuses and other compensation paid to the em-

ployees of respondent, Bethlehem Steel Company. Accordingly, the Board's investigation could not continue and the said trial examiner adjourned the hearing sine die.

12. The proceeding is now pending and undetermined before the Board.

Materiality and Relevancy of the Evidence Sought by the Board

13. The general nature of the information sought by the Board concerns the wages, salaries, bonuses and other compensation paid to the employees of the respondent, Bethlehem Steel Company.

14. In order to secure the above information, the Board must have access to, and examine, the payroll records, weekly summary sheets for hourly rate employees, semi-monthly sheets for salaried employees, rate record cards, time cards, card of accounts form sheet, payrolls proper and any and all other records, books and memorandum which separately and/or together reflect the weekly, bi-[fol. 29] weekly and monthly wages, salaries, bonuses and other compensation of said employees.

15. Section 708, subdivision 1, of the Act expressly provides that the Board may require this information. It reads:

> "The board, or its duly authorized agents or agencies, shall at all reasonable times have access to, for the purposes of examination, and the right to examine, copy or photograph any evidence, including payrolls or lists of employees, of any person being investigated or proceeded against that relates to any matter under investigation or in question. Any member of the board shall have power to issue subpoenas requiring the attendance and testimony of witnesses and the production of any evidence that relates to any matter under investigation or in question before the board, its member, agent, or agency, conducting the hearing or investigation. Any member of the board, or any agent or agency designated by the board for such purposes, may administer oaths and affirmations, examine witnesses and receive evidence."

16. The information sought by the Board is material and necessary in order that the Board may perform its statutory

duty (the Act, Section 705, subdivision 2) of determining whether the unit sought by the union, or some other unit, is appropriate for the purposes of collective bargaining. This determination depends in each case upon many factors, such as: the similarity or diversity of the wages, hours and working conditions of the employees; the nature of their work; the extent of their responsibility; the amount of contact among the various groups of employees; the ex-
[fol. 30] tent and character that self-organization already has taken among the employees; and others.

17. The information sought by the Board is essential because it may reflect the extent and degree of supervisory authority exercised by the various employees. For example, the amount of compensation may indicate that an employee's supervision is of such a nature as to warrant his exclusion from a collective bargaining unit of lower paid supervisory employees. On the other hand, it may indicate a total lack of supervisory authority, in which case the employee may be excluded from a unit of supervisory employees.

18. The information sought by the Board is essential because it may reveal various wage levels among respondents' supervisory employees. Different wage levels among supervisory employees may indicate different levels of supervisory authority and, thus, be an important factor in influencing the Board to place these supervisory employees in different bargaining units rather than in a single unit.

19. In prior decisions, the Board has given weight to wages, salaries, bonuses and other compensation as a factor in determining the appropriate bargaining unit. For example:

Matter of John Morrell & Co., Inc., Decision No. 291, 2 S. L. R. B. 17;

Matter of 90 Riverside Drive, et al., Decision No. 100, 1 S. L. R. B. 336;

Matter of Daniel Reeves, Inc., Decision No. 134, 1 S. L. R. B. 359;

[fol. 31] *Matter of New York Trap Rock Corp.*, Decision No. 157, 1 S.L.R.B. 440;

Matter of Wallach's Hairdressing Salon, Inc., Decision No. 319, 2 S.L.R.B. 34;

Matter of H. L. Green Co., Inc., Decision No. 653, 2 S.L.R.B. 573;
Matter of Singer Sewing Machine Company, Decision No. 512, 2 S.L.R.B. 512;
Matter of Robbins Reef Motor Co., Inc., Decision No. 495, 2 S.L.R.B. 229;
Matter of Horn and Hardart Co., Decision No. 2335, 6 S.L.R.B. 21;
Matter of Charles Frelhofer Baking Co., Decision No. 2498, 6 S.L.R.B. 395.

20. Further, when the Board conducts an election, it needs the payroll records to make sure that those who seek to vote are within the eligible group and to establish the identity of persons seeking to vote.

This Application

21. This application is brought pursuant to Section 708, subdivision 3, of the Act, which provides as follows:

> "In case of contumacy or refusal to obey a subpoena issued to any person the supreme court of any county within the jurisdiction f which the inquiry is carried on or within the jurisdiction of which said person guilty of contumacy or refusal to obey is found or resides or transacts business, upon application by the Board shall have jurisdiction to issue to such person an order requiring such person to appear before the Board, its member, agent, or agency, there to produce evidence if so ordered, or there to give testimony [fol. 32] touching the matter under investigation or in question; and any failure to obey such order of the court may be punished by said court as a contempt thereof."

22. The reason why an Order to Show Cause is requested is that an investigation is pending and undetermined before the Board in connection with which the testimony of the persons subpoenaed and the documents required by the subpoena duces tecum are necessary, and a delay in the hearing and determination of this application would prejudice the rights of the parties to the proceeding pending before the Board and impede the Board in discharging its statutory duties.

23. No previous application for the relief herein sought has been made.

Wherefore, the New York State Labor Relations Board respectfully prays this Honorable Court for an Order requiring and directing the said respondent, Bethlehem Steel Company, to produce the documents and evidence required by the subpoena duces tecum duly served upon it, and the respondents, Edward F. Entwisle, Chauncey L. Baker, William H. Peters, Jr., and J. Driscoll Dewitt, to appear and attend before a trial examiner designated by the New York State Labor Relations Board, testify and give evidence pursuant to subpoenas duly served upon them in an investigation pending before the Board entitled "In the Matter of Bethlehem Steel Company-and-Foreman's Association of America, Bethlehem Steel Chapter No. 50," and [fol. 33] for such other, further and different relief as to this Court may seem just and proper.

Dated: New York, N. Y., January 31, 1945.

Rev. William J. Kelley, O.M.I., Chairman.

STATE OF NEW YORK,
City of New York,
County of New York, ss:

Rev. William J. Kelley, O.M.I., being duly sworn, deposes and says: That he is Chairman of the New York State Labor Relations Board, the petitioner herein; that he has read the foregoing petition and knows the contents thereof; that the same is true to his own knowledge, except as to the matters therein stated to be alleged on information and belief, and as to those matters, he believes it to be true.

Rev. William J. Kelley, O.M.I.

Sworn to before me this 31st day of January, 1945.
(Signed) William J. Peterson, Notary Public,
Queens Co. No. 1627.

[fol. 34] EXHIBIT A TO PETITION FOR ENFORCEMENT OF SUBPOENAS AND SUBPOENA DUCES TECUM.

Subpoena Duces Tecum

The People of the State of New York to Bethlehem Steel Co., by Edward F. Entwistle, General Manager, 1915 Hamburg Turnpike, Hamburg, N. Y., Greeting:

We Command You, that all business and excuses being laid aside, you and each of you appear and attend before a Trial Examiner of the New York State Labor Relations Board at Hearing Room Part 4, State Office Building, in the City of Buffalo, N. Y. on the 24th day of November, 1944 at 10:00 o'clock in the forenoon, to testify and give evidence in a certain proceeding now pending before the New York State Labor Relations Board in the matter of

Bethlehem Steel Co.—and—Foreman's Association of America; Bethlehem Steel Chapter No. 50, Case No. WE-379

and that you bring with you and produce at said time and place, or at any adjourned date thereof, the following:

All payroll register sheets, weekly summary sheets for hourly rate employees, semi-monthly sheets for salaried employees, rate record cards, time cards, card of accounts form sheet, payrolls proper and any and all other records, books and memoranda which separately and/or together reflect the weekly, bi-weekly and monthly wages, salaries, bonuses and all other compensation paid to the categories [fol. 35] of employees contained in Schedule A annexed hereto, during the month of October, 1944; or in the alternative a verified statement setting forth each of the said categories of employees in said Schedule A and their respective weekly, bi-weekly or monthly wages, salaries, bonuses and all other compensation paid to said categories during the month of October, 1944, now in your custody, and all other deeds, evidences and writings which you have in your custody concerning the premises.

And for a Failure to Attend, or to produce the deeds, evidence and writings aforesaid, you will be subject to the proceedings and penalties provided in Section 708, Par. 3, Article 20 of the Labor Law.

Witness, Honorable H. Myron Lewis one of the Members of the New York State Labor Relations Board at New

York, New York, the 15 day of November, one thousand nine hundred and forty-four.

(S.) H. Myron Lewis, Member of the New York State Labor Relations Board.

SCHEDULE A

Schedule A annexed to the subpoena duces tecum addressed to Bethlehem Steel Co. is the same as Schedule A printed herein above at Folios 21 to 61, except that at the end of the list of positions in each Division named in Schedule A there appeared the following words: "Skilled, semi-skilled and unskilled labor employed in this division."

[fol. 36] EXHIBIT B TO PETITION FOR ENFORCEMENT OF SUBPOENAS AND SUBPOENA DUCES TECUM

Subpoena

The People of the State of New York to "John" Baker, the first name John being fictitious, the person intended is in charge of the personnel department and is known as "management's representative," % Bethlehem Steel Co., 1915 Hamburg Turnpike, Lackawanna, N. Y., Greeting:

We Command You, that all business and excuses being laid aside, you and each of you appear and attend before a Trial Examiner of the New York State Labor Relations Board at Hearing Room Part 4, State Office Building, in the City of Buffalo, N. Y. on the 24th day of November, 1944 at 10:00 o'clock in the fore noon, or at any adjourned date thereof, to testify and give evidence in a certain proceeding now pending before the New York State Labor Relations Board in the matter of

Bethlehem Steel Co.—and—Foreman's Association of America, Bethlehem Steel Chapter No. 50, Case No. WE-379

And for a Failure to Attend, you will be subject to the proceedings and penalties provided in Section 708, Par. 3,

Article 20 of the Labor Law, and the Rules and Regulations of the New York State Labor Relations Board.

Witness, Honorable H. Myron Lewis one of the Members of the New York State Labor Relations Board at New York, New York, the 15 day of November one thousand nine hundred and forty-four.

(S.) H. Myron Lewis, Member of the New York State Labor Relations Board.

[fol. 37] Subpoena

The People of the State of New York to William H. Peters, Jr. (Works Accountant) % Bethlehem Steel Co., 1915 Hamburg Turnpike, Lackawanna, N. Y., Greeting:

We Command You, that all business and excuses being laid aside, you and each of you appear and attend before a Trial Examiner of the New York State Labor Relations Board at Hearing Room Part 4, State Office Building, in the City of Buffalo, N. Y. on the 24th day of November, 1944 at 10:00 o'clock in the fore noon; or at any adjourned date thereof, to testify and give evidence in a certain proceeding now pending before the New York State Labor Relations Board in the matter of

Bethlehem Steek Co.—and—Foreman's Association of America, Bethlehem Steel Chapter No. 50, Case No. WE-379

And for a Failure to Attend, you will be subject to the proceedings and penalties provided in Section 708, Par. 3, Article 20 of the Labor Law, and the Rules and Regulations of the New York State Labor Relations Board

Witness, Honorable H. Myron Lewis one of the Members of the New York State Labor Relations Board at New York, New York, the 15 day of November one thousand nine hundred and forty-four.

(S.) H. Myron Lewis, Member of the New York State Labor Relations Board.

[fol. 38] Subpoena

The People of the State of New York to Richard (Dick) De Witt (Head of Employment Department) % Bethlehem Steel Co., 1915 Hamburg Turnpike, Lackawanna, N. Y., Greeting:

We Command You, that all business and excuses being laid aside, you and each of you appear and attend before a Trial Examiner of the New York State Labor Relations Board at Hearing Room Part 4, State Office Building, in the City of Buffalo, N. Y. on the 24th day of November, 1944 at 10:00 o'clock in the fore noon, or at any adjourned date thereof, to testify and give evidence in a certain proceeding now pending before the New York State Labor Relations Board in the matter of

Bethlehem Steel Co.—and—Foreman's Association of America, Bethlehem Steel Chapter No. 50, Case No. WE-379

And for a Failure to Attend, you will be subject to the proceedings and penalties provided in Section 708, Par. 3, Article 20 of the Labor Law, and the Rules and Regulations of the New York State Labor Relations Board

Witness, Honorable H. Myron Lewis one of the Members of the New York State Labor Relations Board at New York, New York, the 15 day of November one thousand nine hundred and forty-four.

(S.) H. Myron Lewis, Member of the New York State Labor Relations Board.

[fol. 39] Subpoena

The People of the State of New York to Edward F. Entwistle (General Manager) % Bethlehem Steel Co., 1915 Hamburg Turnpike, Lackawanna, N. Y., Greeting:

We Command You, that all business and excuses being laid aside, you and each of you appear and attend before a Trial Examiner of the New York State Labor Relations Board at Hearing Room Part 4, State Office Building, in the City of Buffalo, N. Y. on the 24th day of November, 1944 at 10:00 o'clock in the fore noon, or at any adjourned date thereof, to testify and give evidence in a certain proceeding

now pending before the New York State Labor Relations Board in the matter of

Bethlehem Steel Co.—and—Foreman's Association of America, Bethlehem Steel Chapter No. 50, Case No. WE-379

And for a Failure to Attend, you will be subject to the proceedings and penalties provided in Section 708, Par. 3, Article 20 of the Labor Law, and the Rules and Regulations of the New York State Labor Relations Board

Witness, Honorable H. Myron Lewis one of the Members of the New York State Labor Relations Board at New York, New York, the 15 day of November one thousand nine hundred and forty-four.

(S.) H. Myron Lewis, Member of the New York State Labor Relations Board.

[fol. 40] EXHIBIT C TO PETITION FOR ENFORCEMENT OF SUBPOENAS AND SUBPOENA DUCES TECUM

Return Receipt

Form 3811
Rev. 1-4-40

Received from the Postmaster the Registered or Insured Article, the original number of which appears on the face of this Card.

S/1 Beth Steel Co. Gen Mgr:
(Signature or name of addressee)

S/2 F. M. Lockwood
(Signature of addressee's agent—Agent should enter addressee's name on line One above)

Date of delivery 11-17-44, 194

U. S. Government Printing Office 16-12421

EXHIBIT D TO PETITION FOR ENFORCEMENT OF SUBPOENAS AND SUBPOENA DUCES TECUM

Return Receipt

Form 3811
Rev. 1-4-40

Received from the Postmaster the Registered or Insured Article, the original number of which appears on the face of this Card.

S/1 Beth. Steel Co. Gen Mgr.
(Signature or name of addressee)

S/2 F. M. Lockwood
(Signature of addressee's agent—Agent should enter addressee's name on line One above)

Date of delivery 11-17-44, 194

U. S. Government Printing Office 16-12421

Return Receipt

Form 3811
Rev. 1-4-40

Received from the Postmaster the Registered or Insured Article, the original number of which appears on the face of this Card.

S/1 Beth Steel Co.—Wm Peters
(Signature or name of addressee)

S/2 F. M. Lockwood
(Signature of addressee's agent—Agent should enter addressee's name on line One above)

Date of delivery 11-17-44, 194

U. S. Government Printing Office 16-12421

[fol. 41] Return Receipt

Form 3811
Rev. 1-4-40

Received from the Postmaster the Registered or Insured Article, the original number of which appears on the face of this Card.

S/1 Beth Steel Co. De Witt Emply
(Signature or name of addressee)

S/2 F. M. Rockwood
(Signature of addressee's agent—Agent should enter addressee's name on line ONE above)

Date of delivery 11-17-44, 194

Return Receipt

Form 3811
Rev. 1-4-40

Received from the Postmaster the Registered or Insured Article, the original number of which appears on the face of this Card.

S/1 Beth Steel Co. "John" Barker
(Signature or name of addressee)

S/2 F. M. Lockwood
(Signature of addressee's agent—Agent should enter addressee's name on line ONE above)

Date of delivery 11-17-44, 194

[fol. 42] EXHIBITS E, F AND G TO PETITION FOR ENFORCEMENT OF SUBPOENAS AND SUBPOENA DUCES TECUM

STATE OF NEW YORK,
City of New York,
County of New York, ss:

Anne M. Hanrahan, being duly sworn, deposes and says:

That she is a typist in the office of the New York State Labor Relations Board, 250 West 57 St., Borough of Manhattan, City, County and State of New York;

That she is over the age of twenty-one (21) years and not a party to this proceeding:

That on the 15th day of November, 1944, she served duplicate originals of the attached subpoenas and subpoena duces tecum by registered mail upon the following:

A subpoena to William H. Peters, Jr. (Works Accountant), % Bethlehem Steel Co., 1915 Hamburg Turnpike, Lackawanna, N. Y.

A subpoena to Edward F. Entwistle (Central Manager), % Bethlehem Steel Co., 1915 Hamburg Turnpike, Lackawanna, N. Y.

A subpoena to Richard (Dick) De Witt (Head of Employment Department), % Bethlehem Steel Co., 1915 Hamburg Turnpike, Lackawanna, N. Y.

A subpoena to "John" Baker, the first name John being fictitious, the person intended is in charge of the personnel department and is known as "management's representative," % Bethlehem Steel Co., 1915 Hamburg Turnpike, Lackawanna, N. Y.

A subpoena duces tecum to Bethlehem Steel Co., by Edward F. Entwistle, General Manager, 1915, Hamburg Turnpike, Lackawanna, N. Y.

[fol. 43] by depositing the same security enclosed in postpaid wrapper in a branch post office regularly maintained by the United States Government at Columbus Circle Station, West 60th Street, New York, N. Y., directed to said persons and corporation listed above at said address, that being the place where the said William H. Peters, Jr., Edward F. Entwistle, Richard (Dick) DeWitt, "John" Baker, and Bethlehem Steel Co., have their place of business, between which places there then was and now is a regular communi-

cation by mail; and at the same time placing a United States Post Office money order in the same said post-paid wrapper as follows:

Money Order No. 75969, to William H. Peters, Jr., for $2.10

Money Order No. 75968, to Edward F. Entwistle, for $2.10

Money Order No. 75966, to Richard (Dick) DeWitt, for $2.10

Money Order No. 75967, to "John" Baker for $2.10

Money Order No. 75965, to Bethlehem Steel Co., for $2.60

as and for the lawful fees of such witnesses and corporation to which they, as aforesaid, were entitled for mileage for traveling from 1915 Hamburg Turnpike, Lackawanna, N. Y., to the place where such witnesses and corporation, as aforesaid, are required to attend, which is at a distance of not over twenty (20) miles, and for one day's attendance of such witnesses and corporation;

That the United States Government Post Office registered [fol. 44] mail return receipts for the aforesaid registered mail post-paid wrappers, together with the United States Government Post Office receipts for the aforesaid money orders, payable to the persons and corporation as listed above are attached hereto and made a part hereof;

Deponent knew the persons served, as aforesaid, to be the same persons mentioned and described in said subpoenas as such witnesses and knew the said corporation served as aforesaid to be the corporation mentioned and described in said subpoena duces tecum and knew said Edward F. Entwistle to be such officer thereof.

(Signed) Anne M. Hanrahan.

Sworn to before me this 17th day of November, 1944.
(Signed) William J. Peterson, Notary Public, Queens Co. No. 1627.

[fol. 45] IN SUPREME COURT OF NEW YORK, COUNTY OF ERIE

[Same title]

AFFIDAVIT OF EDWARD F. ENTWISLE, READ IN OPPOSITION TO APPLICATION

STATE OF NEW YORK,
County of Erie, ss.:

Edward F. Entwisle, being duly sworn, deposes and says:

I am one of the individual respondents in the above-entitled action and I am the General Manager of the Lackawanna Plant (hereinafter called the Lackawanna Plant) of Bethlehem Steel Company (hereinafter called the Company), the corporate respondent in the above-entitled action.

This affidavit is made by me in opposition to the application of the New York State Labor Relations Board (hereinafter sometimes called the State Board) for an order directing the Company to comply with a subpoena duces tecum and the individual defendants to comply with subpoenas, all dated November 15, 1944, and returnable on November 24, 1944, before a Trial Examiner of the State Board in a proceeding pending before such Board entitled "Bethlehem Steel Company and Foreman's Association of America, Bethlehem Chapter No. 50, Case No. WE-379" (which proceeding is hereinafter called the State Board proceeding). A copy of the subpoena duces tecum which was served on the Company is annexed as Exhibit A to the petition of the State Board in the above-entitled action, and copies of the subpoenas served on the individual respond-
[fol. 46] ents are annexed as Exhibit B to such petition.

The State Board proceeding is an investigation by such Board of an alleged controversy concerning the representation for the purposes of collective bargaining of certain supervisory personnel at the Lackawanna Plant. Such proceedings arose out of an amended petition filed with the State Board by Foreman's Association of America, Bethlehem Chapter No. 50 (hereinafter called the Foreman's Association) for certification as the representative of employees in a bargaining unit consisting of foremen, general foremen and supervisors, exclusive of superintendents, in the employ of the Company at the Lackawanna Plant. A copy of such amended petition and of the notice

of hearing thereon issued by the State Board under date of October 23, 1944, is annexed hereto as Exhibit A. Such amended petition is hereinafter sometimes called the petition of the Foreman's Association.

The Company is a Pennsylvania corporation, licensed to do business in the State of New York. It is engaged, among other things, in the production and sale of steel and steel products. It owns and operates plants engaged in the production of steel and steel products in the States of New York (including the Lackawanna Plant), Pennsylvania, Maryland, California and Washington. The Lackawanna Plant, which is the only plant involved in the State Board proceeding, is located in and near Buffalo and Lackawanna, New York, on several tracts of land having an aggregate area of approximately 1,200 acres. The Company employs approximately 11,100 employees at the Lackawanna Plant, of whom approximately 650 are in- [fol. 47] cluded in the supervisory classifications for which the Foreman's Association seeks by its petition in the State Board proceeding to be certified as the exclusive collective bargaining representative.

The Company is engaged at the Lackawanna Plant in the manufacture of steel and steel products, including structural sections, sheet piling, cold rolled sheets and strip, hot rolled sheets and strip, sheared plates, rails, splice bars, tie plates, bars, billets, blooms and slabs. The principal raw materials used at the Lackawanna Plant are coal, coke, iron ore, scrap, oil, limestone and refractories. Most of such raw materials are delivered to the Lackawanna Plant by lake vessels which are discharged at docks which are located on the premises of, and are a part of, the Lackawanna Plant.

During the calendar year 1943 the aggregate value of all materials used by the Company at the Lackawanna Plant was in excess of $65,000,000, of which more than 90% was delivered to said plant from points outside the State of New York. During 1943 the Company manufactured at the Lackawanna Plant finished products valued in excess of $122,000,000, of which more than 80% was shipped from said plant to points outside the State of New York.

The duties of the supervisory personnel at the Lackawanna Plant, including the supervisory personnel comprising the alleged bargaining unit as set forth in the petition of the Foreman's Association, include, in general: the

supervising and directing of the work of employees at the Lackawanna Plant and the instructing of such employees as to the manner of performing their work; the enforcement among such employees of rules and regulations of [fol. 48] the Company; the making of recommendations with regard to the hiring, discharging, promotion, transfer, lay-off and recalling to work of such employees; the disciplining of such employees; the assignment of employees to work; and the representation of the Company in the handling of grievances which are presented to it by such employees. In the performance of such duties such supervisory personnel are required to act on behalf of and in the interest of the Company in its relations with the employees whom they supervise.

Hearings in the State Board proceeding were held at Buffalo, New York, on November 9, 10, 11, 24 and 25, 1944, before I. L. Broadwin, a Trial Examiner designated for that purpose by the State Board. At such hearings the Company appeared specially by its attorneys, Cravath, Swaine & Moore, and objected to the jurisdiction of the State Board and moved that the petition of the Foreman's Association be dismissed.

The Company refused to produce the documents and evidence called for by the above-mentioned subpoena duces tecum, upon the grounds that the State Board does not have jurisdiction of the subject matter of the State Board proceeding and that the documents and evidence called for by such subpoena duces tecum were not relevant or material to any issue in such proceeding.

The documents and evidence sought by the State Board include information as to the wages, salaries and earnings paid to all classifications of employees in twelve divisions of the Lakawanna Plant. Such documents and evidence would include information as to the compensation of approximately 10,000 employees at the Lackawanna Plant, [fol. 49] of whom only approximately 650 are included in the alleged appropriate unit described in the petition of the Foreman's Association. Such information is not public information. It is highly confidential and a disclosure of it, especially the disclosure to competitors of the Company in the steel industry, would result in irreparable injury to the business of the Company and seriously impair its competitive position in such industry. The disclosure of such information to competitors of the Company would

not only enable them to determine the amounts being paid by the Company to individual supervisory employees at the Lackawanna Plant, but it also would enable such competitors to calculate with a reasonable degree of accuracy the labor costs of the Company at its Lackawanna Plant.

The Trial Examiner at the hearing before him stated the purpose for which such information was sought as follows (Stenographic Minutes of Hearing, pages 124 to 125):

> "Now, I have been looking over Board's Exhibit 6 and I find we will simply have to have testimony on the records as to salaries. * * * That is one of the elements that are to be considered, and a very important element, in arriving at a decision as to whether or not a particular job, a man holding a particular job, by comparison, someone is actually a supervisory employee, exercising supervision of such a nature as to identify him with management, to such an extent as to warrant exclusion from a collective bargaining unit of supervisory employees. * * *"

The State Board in its petition in the above-entitled action alleges that the information sought by it is necessary [fol. 50] because "the amount of compensation may indicate that an employee's supervision is of such a nature as to warrant his exclusion from a collective bargaining unit of lower paid supervisory employees." In my opinion, however, the amount of compensation which is paid by the Company to an employee does not give any indication as to whether or not the duties of that employee are supervisory in nature or the extent of his duties which are supervisory in nature. The amount of compensation which is paid by the Company to a particular employee is determined by a great variety of factors, among which are, the special technical or professional knowledge and skill which is required of him, his experience and length of service with the Company, his ability to perform any duties which may be required of him, the general level of compensation being paid for comparable work in other plants and by other employers, and the general conditions of supply of and demand for persons having comparable knowledge, skill and experience. In respect of supervisory personnel, in particular, the individual personality, trustworthiness and general character of the particular employee, and especially his qualities of leadership, initiative, alertness and loyalty,

are important factors in determining the amount of compensation which is paid to him.

In an industrial operation such as a steel plant there are frequently individual employees whose duties require a high degree of skill and technical knowledge and experience and who exercise no supervisory duties whatsoever but who receive substantially greater compensation than other employees who exercise supervisory duties over a large number of men. There are also many employees whose duties [fol. 51] include supervisory duties but who also must have a high degree of skill and technical knowledge and experience and who because of the technical nature of their work receive substantially greater compensation than other supervisory employees who have supervision over a much larger number of employees. Accordingly, the amount of compensation which is paid to any particular employee or any particular class of employees does not furnish any reliable indication as to whether or not the work of such employees is supervisory in nature or of the extent to which such employees act for and in the interest of the Company in its relations with others of its employees.

Pursuant to the subpoena served on me by the State Board, I appeared and testified at the hearing before the Trial Examiner on November 24, 1944. At such hearing I answered all questions asked of me, except certain questions concerning the compensation paid to division superintendents at the Lackawanna Plant and to three general foremen and a master mechanic and chief electrician at such Plant. Such questions are set forth in the following extracts from the stenographic minutes of the hearing before the Trial Examiner on November 24, 1944 (pages 470 and 471), the questions being questions asked of me by the Trial Examiner and the answers being my answers to such questions:

> "Q. Do the salaries of these general foremen, whose powers and functions are almost identical with those of superintendents—are they the same salaries? Do you know?
>
> "A I know, but I don't care to state what they are.

"Q. Now, let me ask you this, who fixes the salaries [fol. 52] of heads of the departments who constitute your staff, the twenty-one?

"A. They are fixed largely by myself and approved in Bethlehem.

"Q. Well, you say 'largely'. Are there exceptions to that rule or practice?

"A. No. Maybe I'd better correct it and say in every case they are fixed by myself and approved in Bethlehem.

"Q. They are, however, subject to approval at the main office?"

"A. That's right.

"Q. And you know the salaries of these men?

"A. Yes.

"Q. Do you also know the salaries of their assistants, the assistant superintendents?

"A. Yes.

"Q. And your position with respect to answering any inquiry regarding their salaries is the same as it is with respect to the other people?

"A. That's correct.

"Q. You decline to give any information with reference to their salaries?

"A. That's correct."

The employees to whom the Trial Examiner referred in the first question above quoted as "general foremen" were the following employees of the Company at its Lackawanna Plant: the general foreman of the General Billet Yard, the general foreman of the Splice Bar and Tie Plate Department (Rolling Mills Division), the general foreman of [fol. 53] Brickmasons (Mechanical Division) and the Master Mechanic and Chief Electrician of the Strip Mill Division. At the hearing before the Trial Examiner the Foreman's Association agreed (Stenographic Minutes of Hearing, pages 628 to 630) that the general foreman of Brickmasons should not be included in the unit which it alleged to be the appropriate bargaining unit. The twenty-one superintendents or heads of departments who are referred to by the Trial Examiner in his above-quoted questions were in charge of the major divisions of the operations at the Lackawanna Plant and the petition of the Foreman's Association expressly excludes them from such alleged

bargaining unit (See Exhibit A annexed hereto). The authority and responsibilities of the other employees who are referred to in the above-quoted questions are substantially similar to the authority and responsibilities of the general foreman of Bricklayers.

The information with regard to the salaries of such supervisory personnel which was called for by the above-quoted questions is highly confidential and I believe that the disclosure of such information, especially its disclosure to competitors of the Company, would cause irreparable harm to it in its business. Furthermore, I believe that none of such information is necessary or would be useful for the purpose of determining whether or not the unit alleged by the Foreman's Association in its petition to be an appropriate unit for the purposes of collective bargaining with the Company is in fact such an appropriate unit.

At the hearing before the Trial Examiner I testified at length with regard to the supervisory organization at the [fol. 54] Lackawanna Plant and the duties, responsibilities and authority of the members of such organization. I did not refuse to answer any questions in that regard. The stenographic transcript of my testimony at such hearing covers over 65 pages. At such hearing, John E. Jacobs, Assistant to the General Manager at the Lackawanna Plant, also testified at length regarding the duties, responsibilities and authority of the various members of supervisory personnel at the Lackawanna Plant. His testimony covers approximately 230 pages of the stenographic minutes of such hearing. A number of other witnesses, some of whom appeared on behalf of the Foreman's Association, also testified at such hearing with regard to such matters. I believe, therefore, that the evidence which was presented to the Trial Examiner at such hearing includes direct testimony with regard to the duties, responsibilities and authority of the supervisory personnel at the Lackawanna Plant which is much more accurate and reliable than any inferences which could be drawn from evidence as to the amounts of salaries, wages or earnings of such supervisory personnel. For reasons which are hereinbefore set forth, I believe that further information with regard to the compensation which is paid to such supervisory personnel or to other employees at the Lackawanna Plant is not necessary and would not be useful for the

purpose of determining the relative scope and importance of the supervisory duties of such personnel.

Edward F. Entwisle.

Sworn to before me this 15th day of February, 1945.
Pauline H. Winkler, Notary Public, Erie Co., N. Y.

[fol. 55] EXHIBIT A

STATE OF NEW YORK, BEFORE THE NEW YORK STATE LABOR RELATIONS BOARD

Case No. WE-379

In the Matter of BETHLEHEM STEEL CO., Employer, and FOREMAN'S ASSOCIATION OF AMERICA BETHLEHEM STEEL CHAPTER NO. 50, Petitioner

AMENDED

PETITION BY EMPLOYEES FOR INVESTIGATION AND CERTIFICATION OF REPRESENTATIVES PURSUANT TO SECTION 705 OF THE NEW YORK STATE LABOR RELATIONS ACT

Name and address of employer: Bethlehem Steel Company, 1915 Hamburg Turnpike, Lackawanna, N. Y.

General nature of business: Steel Manufacturing

Approximate percentage of sales, if any, made to points outside New York State: 85%

Other facts concerning interstate business, if any: None

Approximate total number of employees: 15,000

The types, classifications or groups of employees which the petitioner claims constitute the appropriate bargaining unit or units: Foreman, general foreman, supervisors, exclusive of superintendents

Number of employees within such unit or units: Approximately 500

[fol. 56] Names and addresses of any other known individuals or labor organizations who claim or may claim to represent any of the employees in such bargaining unit: None

Does the petitioner request certification as the collective bargaining representative of the employees within the bargaining unit or units claimed to be appropriate?

The undersigned hereby alleges that a question or controversy has arisen concerning the representation of the employees in the above bargaining unit, in that:

The petitioner has notified the employer, that it represents a majority of the employees in the above stated classification but the employer states that the aforesaid classification does not constitute the appropriate bargaining unit, and thus the employer seeks a certification of the petition by the New York Labor Relations Board before it will recognize the petitioner as the bargaining representatives of the employees outlined in said petition.

The undersigned requests that pursuant to section 705 of the New York State Labor Relations Act, the New York State Labor Relations Board investigate such controversy and certify to the parties the name or names of the representatives that have been designated or selected by said employees.

Name of employees or representatives filing this petition. (If a labor organization, give also name and official position of person acting for the organization.)

Foreman's Association of America Bethlehem Steel Chapter No. 50

Donald J. McNaughton, Pres. Chap. No. 50 FAA.

Address, 98 Bloomfield Avenue. Telephone No., Tr-0694.

[fol. 57] STATE OF NEW YORK

CITY OF BUFFALO,
County of Erie, ss:

On this 20 day of October, 1944 before me personally appeared Donald J. McNaughton to me known to be the person described in, and who executed this petition, who having been duly sworn (or affirmed) before me, stated that to the best of his information and belief, all statements contained therein, both in writing and in print, are true.

Regina J. Reidy, Notary, March, 1946.

STATE OF NEW YORK

BEFORE THE STATE LABOR RELATIONS BOARD

Case No. WE-379

In the Matter of BETHLEHEM STEEL CO., Employer, and FOREMAN'S ASSOCIATION OF AMERICA BETHLEHEM STEEL CHAPTER NO. 50

NOTICE OF HEARING

There has heretofore been filed a petition with the New York State Labor Relations Board by Foreman's Association of America, Bethlehem Steel Chapter No. 50, alleging that a question or controversy has arisen concerning the representation of certain employees of Bethlehem Steel Co. and requesting that, pursuant to authority granted in [fol. 58] Section 705, subdivision 3, of the New York State Labor Relations Act, the New York State Labor Relations Board investigate such question or controversy and certify the name or names of the representatives that have been designated or selected by said employees. Copy of said petition is attached hereto. It appearing to the New York State Labor Relations Board that a question or controversy has arisen concerning the representation of the employees of Bethlehem Steel Co.,

You Are Hereby Notified, that, pursuant to Section 706 subdivision 3, of the said Act, on the 1st day of November, 1944, at 10:00 o'clock in the forenoon, in Hearing Room Part 4; State Office Building, Buffalo, N. Y., a hearing will be conducted before the New York State Labor Relations Board upon the question or controversy concerning representation, at which time and place you shall have the right to appear, in person or otherwise, and to give testimony.

In Witness Whereof, the New York State Labor Relations Board has caused this, its Notice of Hearing, to be signed by its Executive Secretary.

A. M. Goldberg, Executive Secretary.

Dated: New York, N. Y., October 23, 1944.

To:

Bethlehem Steel Co. (R)
1915 Hamburg Turnpike
Lackawanna, N. Y.

Cravath, de Gersdorff, Swaine & Wood, Esqs.
15 Broad Street New York 5, N. Y.

Chester A. McLain, Esq.
c/o Cravath, de Gersdorff, Swaine & Wood, Esqs. 15 Broad Street New York 5, N. Y.

Foreman's Association of America (R)
Bethlehem Steel Chapter No. 50
98 Bloomfield Avenue Buffalo 20, N. Y.

Foreman's Association of America (R)
Attention: Robert H. Keys, Pres.
515 Barlum Tower Detroit 26, Mich.

[fol. 59] In Supreme Court of New York County of Erie

[Same Title]

Affidavit of Chester A. McLain, Read in Opposition to Application

State of New York,
County of New York, ss.:

Chester A. McLain, being duly sworn, deposes and says:

I am an attorney at law and a member of the firm of Cravath, Swaine & Moore, attorneys for the respondents in the above-entitled action.

This affidavit is made by me in opposition to the application of the New York State Labor Relations Board (hereinafter sometimes called the State Board) for an order directing Bethlehem Steel Company (hereinafter called the Company) to comply with a subpoena duces tecum and directing the individual respondents to comply with subpoenas, all of which subpoenas were dated November 15, 1944, and were returnable on November 24, 1944, before a Trial Examiner of the State Board in a proceeding pending before such Board entitled "Bethlehem Steel Company and Foreman's Association of America, Bethlehem Chapter No. 50, Case No. WE-379" (which proceeding is hereinafter called the State Board proceeding).

The State Board proceeding, in connection with which the above-mentioned subpoenas were issued, is a proceeding brought by the State Board under Section 705 of the

New York State Labor Relations Act (Laws of 1937, Chapter 443, as amended by Laws of 1942, Chapter 518, [fol. 60] hereinafter sometimes called the State Act) for the investigation and certification of representatives for the purposes of collective bargaining of certain supervisory personnel at the Lackawanna Plant of the Company. Such proceeding arose out of a petition filed with the State Board by Foreman's Association of America, Bethlehem Chapter 50 (hereinafter called the Foreman's Association), for certification as the exclusive bargaining representative of employees in an alleged appropriate unit consisting of foremen, general foremen and supervisors, exclusive of superintendents, at the Lackawanna Plant.

The copy of the Constitution of the Foreman's Association which was introduced in evidence in the State Board proceeding as Board's Exhibit 14 contains the following provisions, among others:

"Article I—Name

"This voluntary association of supervisory employees shall be known as Foreman's Association of America.

"Article II—Purposes

"The purposes of the Association shall be to encourage social acquaintances among supervisory employees, to confer and act upon measures for the protection and advancement of the economic welfare of supervisory employees through collective bargaining, and to encourage study, conference, and wider learning among supervisory employees to the end that they may improve in the supervision of men and women in industry.

* * * * * * *

"Article V—Membership

* * * * * * *

"Section 2. Any employee of good moral character, [fol. 61] whose duties require the supervision of other employees, or who directs work, who may or may not supervise other employees, and who is not a member of any other organization recognized by his employer

as representing him in collective bargaining, may become a member of the Association after having been employed as a supervisory employee for a period of not less than thirty (30) days prior to the filing of application for membership, and provided that such application to a Chapter of the Association is accompanied by a membership fee.

"Section 3. No supervisory employee or individual acting as negotiator in formulating employer-policy may become a member of the Foreman's Association of America."

Hearings were held in such proceeding before a Trial Examiner of the State Board on November 9, 10, 11, 24 and 25, 1944. I appeared specially at such hearings on behalf of Bethlehem Steel Company and objected to the jurisdiction of the State Board in such proceeding and moved that the petition therein of the Foreman's Association be dismissed on the following grounds:

"* * * First, that the classifications of employees claimed by the petitioner in that petition to constitute the appropriate bargaining unit or units are subject to the provisions of the National Labor Relations Act and the jurisdiction of the National Labor Relations Board under that Act; and that such classifications of employees are not, therefore, subject to the provisions of the New York State Labor Relations Act or to the jurisdiction of the New York State Labor Relations Board under that Act.

"Secondly, that Bethlehem Steel Company, the employer named in that petition, in its steel manufacturing operations which are referred to in that petition, [fol. 62] is an employer within the meaning and subject to the provisions of the National Labor Relations Act and to the jurisdiction of the National Labor Relations Board under that Act; and said company is not, therefore, an employer within the meaning of and subject to the provisions of the New York State Labor Relations Act or the jurisdiction of the New York State Labor Relations Board under that Act.

"And, thirdly, that the question or controversy which is alleged in the petition in this case is a question or controversy affecting commerce within the meaning of the term 'affecting commerce' as that term is defined

in the National Labor Relations Act and, therefore, that such question or controversy, if it exists, is within the jurisdiction of the National Labor Relations Board under that Act and not within the jurisdiction of the New York State Labor Relations Board under the New York State Labor Relations Act.

"And, fourthly, that if the New York State Labor Relations Act should be so construed as to apply to this employer and these employees and this question or controversy it would be unconstitutional in violation of the provisions of the Constitution of the United States as an invalid interference with commerce among the several states and with foreign nations." (Stenographic Minutes of Hearing, pages 4, 5.)

At the hearing before the Trial Examiner on November 24, 1944, I moved to set aside the above-mentioned subpoenas and subpoena duces tecum upon the grounds above stated and upon the additional ground that the documents and evidence sought to be produced are not relevant or material to any issue in the State Board proceeding. The Trial Examiner denied such motion and, on behalf of the [fol. 63] Company, I refused to make return to the subpoena duces tecum.

I refused on behalf of the Company to comply with the above-mentioned subpoena duces tecum addressed to the Company, because in my opinion the documents and evidence called for by such subpoena are not relevant or material to any issue in the State Board proceeding and because the subject matter of such proceeding is within the exclusive jurisdiction of the National Labor Relations Board (hereinafter called the National Board) under the National Labor Relations Act (hereinafter called the National Act) and is not within the jurisdiction of the State Board under the State Act. The pertinent facts relating to the operations of the Company at the Lackawanna Plant are set forth in an affidavit of Mr. Edward F. Entwisle which is to be filed herewith.

Counsel for the Foreman's Association conceded at the hearing before the Trial Examiner that the Company is engaged in interstate commerce at the Lackawanna Plant (Stenographic Minutes of Hearing, pages 123, 124). The National Board has heretofore determined in four cases that the National Act applies to the Lackawanna Plant and

to questions or controversies concerning the representation of employees of the Company at such Plant. Such cases are as follows:

(1) *Matter of Bethlehem Steel Corporation, Bethlehem Steel Company, and South Buffalo Railway Co. and Steel Workers Organizing Committee, Local Union 1024, C. I. O.*, Case No. R-2415, 30 N. L. R. B. 1006, 32 N. L. R. B. 264 (1941). In that case the National Board held that a question concerning the representation of certain production [fol 64] and maintenance employees of the Company at its Lackawanna Plant was a question affecting commerce within the meaning of the National Act. After directing and conducting an election among such employees, the National Board certified that, pursuant to the provisions of Subsection (a) of Section 9 of the National Act, Steel Workers Organizing Committee, Local Union 1024, C. I. O., was the exclusive representative of such production and maintenance employees for the purposes of collective bargaining.

(2) *Matter of Bethlehem Steel Corporation and Bethlehem Steel Company and American Federation of Labor*, Case No. R-4846, 47 N. L. R. B. 1330 (1943). In that case the National Board held that a question concerning the representation of certain plant protection employees of the Company at its Lackawanna Plant was a question affecting commerce within the meaning of the National Act. After directing and conducting an election among such employees, the National Board certified that, pursuant to subsection (a) of Section 9 of the National Act, the American Federation of Labor was the exclusive representative of such plant protection employees for the purposes of collective bargaining.

(3) *Matter of Bethlehem Steel Corporation and Bethlehem Steel Company and United Steelworkers of America, C. I. O., District 4*, Case No. 3-R-639, 52 N. L. R. B. 1217 (1943). In that case the National Board held that a question concerning the representation of certain employees of the Company in the Order Department at the Lackawanna Plant was a question affecting commerce within the meaning of the National Act. After directing and conducting [fol 65] an election among such employees, the National Board certified that, pursuant to subsection (a) of Section

9 of the National Act, United Steelworkers of America, C. I. O., District 4, was the exclusive representative of such employees for the purposes of collective bargaining.

(4) *Matter of Bethlehem Steel Company and American Federation of Labor, Federal Local 23332*, Case No. 3-R-735, 55 N. L. R. B. 658 (1944). In that case the National Board held that a question concerning the representation of certain employees of the Company in the Fire Department at the Lackawanna Plant was a question affecting commerce within the meaning of the National Act. After directing and conducting an election among such employees, the National Board certified that, pursuant to subsection (a) of Section 9 of the National Act, American Federation of Labor, Federal Local 23332, was the exclusive representative of such employees for the purpose of collective bargaining.

The National Board has held, furthermore, that supervisory employees are employees within the meaning of that Act. *Matter of Sass Manufacturing Co. and Foreman's Association of America*, Case No. 7-C-1148; and *Republic Steel Corp. and Foreman's Association of America*, Case No. 8-C-1569, 56 N. L. R. B. No. 70 (1944).

The State Board introduced in evidence in the State Board proceeding a letter from the Regional Director of the National Board for the Third Region addressed to the Regional Attorney of the State Board from which it appears that, if the Foreman's Association had filed with the National Board a petition under Section 9 of the National Act for investigation and certification of represen- [fol. 66] tatives of the supervisory employees at the Lackawanna Plant, the National Board would have taken jurisdiction over the petition and would have decided the controversy on its merits. A copy of such letter is annexed hereto as Exhibit A-1 and made a part hereof; and a copy of the letter from the Regional Attorney of the State Board, to which Exhibit A-1 was a reply, is annexed hereto as Exhibit A-2 and made a part hereof.

The "Board policy" to which the Regional Director of the National Board refers in his above-mentioned letter is the policy established by the National Board in its decision in *Matter of The Maryland Drydock Company and Local 31 of the Industrial Union of Marine and Shipbuild-*

ing Workers of America, Cases Nos. R-5212, R-5214, 49 N. L. R. B. 733 (1943), in which the National Board dismissed petitions for investigation and certification of representatives of supervisory employees of the employer there concerned. Such policy was expressed by the National Board in that case as follows:

> "We are of the opinion that in the present stage of industrial administration and employee self-organization, the establishment of bargaining units composed of supervisors exercising substantial managerial authority will impede the process of collective bargaining, disrupt established managerial production techniques, *and militate against the effectuation of the policies of the Act.*" (Underscoring added.)

Such policy has been affirmed and applied by the National Board in a number of cases which have been decided by it since its decision in the *Maryland Drydock* case, including a number of cases arising on petitions of the Foreman's Association.

[fol. 67] The facts with regard to compliance by the individual respondents with the subpoenas which were served upon them in the State Board proceeding are as hereinafter set forth.

(a) Mr. Entwisle in response to the subpoena which was served upon him appeared and testified at the hearing before the Trial Examiner on November 24, 1944. He testified at length regarding the nature of the work performed by and the duties and responsibilities of the supervisory personnel at the Lackawanna Plant. He did not refuse to answer any questions which were put to him at such hearing, except certain questions as to the amount of compensation paid by the Company to twenty-one superintendents and department heads at the Lackawanna Plant and to three general foremen and a master mechanic and chief electrician at such Plant. In its petition to the State Board the Foreman's Association did not include such twenty-one superintendents and department heads in the alleged appropriate unit for the purposes of collective bargaining as set forth therein. At the hearing before the Trial Examiner the Foreman's Association stipulated that one of such general foremen should also be excluded from such unit. The State Board does not set forth in its petition herein the specific

questions, if any, which Mr. Entwisle did not answer at such hearing and which the State Board claims he can and should answer.

(b) Mr. Baker in response to the subpoena which was served upon him appeared and testified at an adjourned session of the hearing before the Trial Examiner which was held on November 25, 1944. At such hearing Mr. Baker testified at length regarding the functions of the Industrial [fol. 68] Relations Department at the Lackawanna Plant, of which Department he is head, and the duties and responsibilities of various members of the supervisory personnel at such Plant. His testimony covers over 40 pages of the stenographic minutes of such hearing. The only question that he refused to answer was a question as to the amount of his own salary. The Trial Examiner asked the following question and Mr. Baker gave the following answer (Stenographic Minutes of Hearing, page 597):

> "Q. What is your salary?
> "A. That I refuse to tell you."

Mr. Baker is not included in the alleged appropriate collective bargaining unit which is set forth in the petition of the Foreman's Association to the State Board. He represents the Company in negotiations with representatives of the production and maintenance employees at the Lackawanna Plant. Section 3 of Article V of the Constitution of the Foreman's Association provides as follows:

> "Section 3. No supervisory employee or individual acting as negotiator in formulating employer-policy may become a member of the Foreman's Association of America."

Because of his position as head of the Industrial Relations Department at the Lackawanna Plant Mr. Baker would not under such Section be eligible for membership in the Foreman's Association. The amount of his salary, therefore, could not be relevant or material to any issue in the State Board proceeding.

(c) William H. Peters, Jr., was unable because of illness to comply with the subpoena which was served on him. He had, however, at the request of the Trial Examiner volun- [fol. 69] tarily appeared at the hearing before the Trial

Examiner on November 11, 1944, and testified at length with regard to the operation of the Accounting Department at the Lackawanna Plant. He did not at that time refuse to answer any question asked of him by the Trial Examiner or by any other person present at such hearing.

At the hearing before the Trial Examiner on November 24, 1944, I advised the Trial Examiner that Mr. Peters was ill and I offered to produce a doctor's certificate to that effect, but the Trial Examiner stated that that would not be necessary. The stenographic minutes of my discussion with the Trial Examiner at that time concerning Mr. Peters read as follows:

> "Mr. McLain: • • • Do you want a statement for the record on Mr. Peters?
>
> "Trial Examiner: I take it the position you took now you would decline to—
>
> "Mr. McLain: Mr. Peters is ill.
>
> "Trial Examiner: Oh, that is unnecessary. He isn't here.
>
> "Mr. McLain: I could get a doctor's certificate.
>
> "Trail Examiner: No, no, that is entirely unnecessary. Let's forget about that."

No further request was made for the appearance of Mr. Peters and Mr. Peters did not at any time refuse to appear and to give testimony before the Trial Examiner.

(d) Mr. Dewitt complied with his subpoena by appearing and testifying at the hearing before the Trial Examiner on November 24, 1944. He testified at length under exami- [fol. 70] nation by the Trial Examiner and did not refuse to answer any question asked of him at the hearing.

Chester A. McLain.

Sworn to before me this 15th day of February, 1945.
Pauline H. Winkler, Notary Public, Erie Co., N. Y.

EXHIBIT A-1

National Labor Relations Board, Third Region, Genesee Building, Buffalo, New York

Frank M. Abbate, Regional Attorney, New York State Labor Relations Board, State Office Building, Buffalo (2), New York.

Re: Bethlehem Steel Co. and Foremen's Association of America, Bethlehem Steel Chapter No. 50

DEAR MR. ABBATE:

I have your letter of September 28. I remember your telephone call with respect to the above matter very well. I believe you have misunderstood, in part, my response to your queries over the telephone. I did state that if in the event a petition had been or were to be filed by the Foremen's Association with respect to seeking certification for the company's supervisory employees, in view of the Maryland Drydock decision, this office would not have proceeded to certification thereon and would have refused to issue notice of hearing (in other words, dismissed the petition). [fol. 71] However, I did not state that the national board "would refuse jurisdiction." Accepting a petition and then dismissing, as you know, is quite different from refusing to take jurisdiction. Inasmuch as the Bethlehem Steel Company is engaged in interstate commerce, if the Foremen's Association had filed a petition with the national board, the petition would have been accepted and docketed. Thereafter, under present Board policy we would have proceeded to refuse to issue notice of hearing in this matter on the merit basis that supervisory employees do not comprise an appropriate bargaining unit.

Please accept my assurance of cooperation in all matters. I hope that we can meet in the near future and get acquainted.

With best wishes.

Very truly yours, (Signed) M. S. Ryder, Regional Director.

MSR/c.

[fol. 72] EXHIBIT A-2

F. M. Abbate

September 28, 1944

Mr. Meyer S. Ryder, Regional Director, National Labor Relations Board, Genesee Building, Buffalo 2, New York.

Re: Bethlehem Steel Co. —and— Foreman's Association of America, Bethlehem Steel Chapter No. 50

DEAR SIR:

On August 24, 1944, the Foreman's Association of America, Bethlehem Steel Chapter No. 50, filed a petition with the New York State Labor Relations Board in which they claim to represent a majority of general foremen and supervisors, exclusive of superintendents, at the Bethlehem Steel Co., and as such requested that they be certified as the representative for the purposes of collective bargaining.

On the date that said petition was filed with this Board, I phoned you and asked if your Board wished to take jurisdiction over this matter. You stated to me at that time that the National Board would refuse jurisdiction, and that even if the petition had been filed with your Board, the same would have been dismissed.

Will you kindly, at your earliest convenience, confirm this conversation by letter.

Very truly yours, Frank M. Abbate, Regional Attorney.

[fol. 73] In Supreme Court of New York, Erie County

[Same title]

William E. Grady, Jr. (Frank M. Abbate, of Counsel) for Petitioner.

Cravath, Swaine & Moore, Kenefick, Cooke, Mitchell, Bass & Letchworth, for Respondents (Daniel J. Kenefick, Lyman M. Bass and C. A. McLain, of Counsel).

Memorandum Decision of Mr. Justice Batt

Batt, J.:

The respondents in their opposition to the petition have raised an important question under the Federal Constitution which goes to the jurisdiction of the New York State Labor Relations Board over the subject matter of the above proceeding in which said Board issued the subpoenas which it here seeks to enforce. At the hearing on the order to show cause, the attorney for said Board cited the decision of the Court of Appeals in Matter of Davega-City Radio, Inc. v. State Labor Relations Board, 281 N. Y. 13 (1939), and the decision of Justice Hinkley in Allegheny Ludlum Steel Corporation v. Kelley, et al., 49 N. Y. Supp. (2nd) 762 (1944), as decisive of that question in this Court. The latter case is now on appeal to the Appellate Division of this Court.

The constitutional question here raised is of such far reaching importance, not only to the parties to this action but also to industry generally in this State, that it is in the interest of all concerned that such question be finally determined as promptly as is consistent with orderly judicial procedure.

[fol. 74] Whether or not the Court of Appeals shall ultimately determine that its decision in the Davega-City Radio case, supra, is decisive of that question in the instant case, I feel that I should treat that decision as controlling here. I also feel that I should follow the opinion of Mr. Justice Hinkley in the Allegheny Ludlum Steel case, supra, on that question. Accordingly, I have granted the petition of the New York State Labor Relations Board herein as to the respondents.

Dated March 1, 1945.

Paul J. Batt, Justice of Supreme Court.

[fols. 75-78] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 79] In Supreme Court of New York, County of Erie

In the Matter of the Application of
New York State Labor Relations Board, Petitioner-Respondent

For an Order

against

Bethlehem Steel Company, Edward F. Entwisle, Chauncey L. Baker, William H. Peters, Jr., and J. Driscoll Dewitt, Respondents-Appellants

Notice of Appeal to Court of Appeals

Sirs:

Please Take Notice that the above-named respondents-appellants hereby appeal to the Court of Appeals of the State of New York from the order of the Appellate Division of the Supreme Court for the Fourth Department entered in the office of its Clerk on May 2, 1945, a certified copy of which was filed and entered in the office of the Clerk of the County of Erie on or about the 5th day of May, 1945, affirming the final order made in the above-entitled action by Honorable Paul J. Batt at a Special Term, Part I, of the Supreme Court for the County of Erie and entered in the office of the Clerk of said County on or about the 1st day of March, 1945, which final order granted the application of New York State Labor Relations Board, the petitioner-respondent herein, for an order against the respondents-[fol. 80] appellants and directed the respondent-appellant, Bethlehem Steel Company, to produce certain documents and evidence in a proceeding pending before said Board entitled "In the Matter of Bethlehem Steel Company—and —Foreman's Association of America, Bethlehem Steel Chapter No. 50," and directed the respondents-appellants, Edward F. Entwisle, Chauncey L. Baker, William H. Peters, Jr., and J. Driscoll Dewitt, to appear before a Trial Examiner designated by said Board and to testify and give evidence in said proceeding, all as more fully set forth in

said final order. This appeal is taken as of right from the whole and from each and every part of said order on the ground that there is directly involved the construction of the Constitution of the United States of America.

Dated, May 12, 1945.

Yours respectfully, Cravath, Swaine & Moore, 15 Broad Street, New York, N. Y. Kenefick, Cooke, Mitchell, Bass & Letchworth, Marine Trust Building, Buffalo, N. Y., Attorneys for the Respondents-Appellants.

To: William A. Grady, Jr., 250 West 57th Street, New York, N. Y., Attorney for the Petitioner-Respondent. Clerk of the above-named Court.

[fol. 81] In Supreme Court of New York, Appellate Division

Present: Hon. Marsh N. Taylor, Presiding Justice; Hon. William F. Dowling, Hon. Francis F. McCure, Hon. George A. Larkin, Hon. William F. Love, Associate Justices

In the Matter of the Application of

New York State Labor Relations Board, Respondent,

For an Order

against

Bethlehem Steel Company, Edward F. Entwisle, Chauncey L. Baker, William H. Peters, Jr., and J. Driscoll Dewitt, Appellants

Order of Affirmance Appealed From

The above named Bethlehem Steel Company, Edward F. Entwisle, Chauncey L. Baker, William H. Peters, Jr., and J. Driscoll Dewitt, respondents in this proceeding, having appealed to the Appellate Division of the Supreme Court, Fourth Department, from certain parts of an order of the Supreme Court, entered in the office of the Clerk of the County of Erie, on the 1st day of March, 1945, and the said appeal having been submitted by Mr. Lyman Bass, of counsel for the appellants, and by Mr. William E. Grady, Jr., of counsel for the respondent, and due deliberation having been had thereon.

[fol. 82] It is hereby Ordered, That the order so far as appealed from be, and the same hereby is, affirmed with ten dollars costs and disbursements.

All concur.

Enter.

Marsh N. Taylor.

Entered 2nd day of May, 1945. (S.) Herbert E. Wait, Clerk.

AFFIDAVIT OF NO OPINION

STATE OF NEW YORK,
County of New York, ss:

John H. Morse, being duly sworn, deposes and says that he is an attorney associated with Cravath, Swaine & Moore, attorneys for the respondents-appellants herein, and is familiar with the facts and proceedings herein, that no opinion in writing was rendered by the Appellate Division in making the order appealed from.

John H. Morse.

Sworn to before me this 28th day of May, 1945.
Saul Schneiderman, Notary Public, Kings County.

[fol. 83] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 84] IN COURT OF APPEALS OF NEW YORK

Pleas in the Court of Appeals, held at Court of Appeals Hall, in the City of Albany, on the 29th day of November in the year of our Lord one thousand nine hundred and forty-five, before the Judges of said Court.

Witness, The Hon. John T. Loughran, Chief Judge, Presiding. John Ludden, Clerk.

REMITTITUR—November 30, 1945

In the Matter of the Application of

NEW YORK STATE LABOR RELATIONS BOARD, Petitioner-Respondent,

For an Order

against

BETHLEHEM STEEL COMPANY, EDWARD F. ENTWISLE, CHAUNCEY L. BAKER, William H. Peters, Jr., and J. Driscoll Dewitt, Respondents-Appellants

Be it Remembered, That on the 2nd day of June in the year of our Lord one thousand nine hundred and forty-five, Bethlehem Steel Company and others, the appellants in this cause, came here unto the Court of Appeals, by Cravath, Swaine & Moore and Kenefick, Cooke, Mitchell, Bass & Letchworth, their attorneys, and filed in the said Court a Notice of Appeal and return thereto from the [fol. 85] order of the Appellate Division of the Supreme Court in and for the Fourth Judicial Department. And New York State Labor Relations Board, the respondent-in said cause, afterwards appeared in said Court of Appeals by William E. Grady, Jr., its attorney.

Which said Notice of Appeal and the return thereto, filed as aforesaid, are hereunto annexed.

Whereupon, The said Court of Appeals having heard this cause argued by Mr. C. A. McLain, of counsel for the appellants, and by Mr. William E. Grady, Jr., of counsel for the respondent-, and after due deliberation had thereon, did order and adjudge that the order of the Appellate Division of the Supreme Court appealed from herein be and the same hereby is affirmed with costs.

And it was also further ordered, that the records aforesaid, and the proceedings in this Court, be remitted to the said Supreme Court, there to be proceeded upon according to law. And afterwards, to wit, on the seventh day of December, 1945, an order was duly made amending the remittitur herein, a certified copy of which order is hereto attached and made a part hereof.

Therefore, it is considered that the said order be affirmed with costs, as aforesaid.

And hereupon, as well the Notice of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said Court of Appeals remitted into the Supreme Court of the State of New York before the Justices thereof, according to the form of the statute in such case made and provided, [fol. 86] to be enforced according to law, and which record now remains in the said Supreme Court, before the Justices thereof, &c.

(S.) John Ludden, Clerk of the Court of Appeals of the State of New York.

Court of Appeals, Clerk's Office,
Albany, November 30, 1945:

I Hereby Certify, that the preceding record contains a correct transcript of the proceedings in said cause in the Court of Appeals, with the papers originally filed therein, attached thereto.

(S.) John Ludden, Clerk.

(Sealed.)

[fol. 87] In Court of Appeals of New York

Present, Hon. John T. Loughran, Chief Judge, presiding.

In the Matter of the Application of New York State Labor Relations Board, Petitioner-Respondent, for an Order against Bethlehem Steel Company, Edward F. Entwisle, Chauncey L. Baker, William H. Peters, Jr., and J. Driscoll DeWitt, Respondents-Appellants

Order Amending Remittitur—December 7, 1945

A motion to amend the remittitur in the above cause being duly made herein upon the part of the respondents-appellants, papers having been submitted thereon and due deliberation having been thereupon had, it is

Ordered, that the said motion be and the same hereby is granted and the remittitur amended by adding thereto the following:

"A question under the Constitution of the United States was presented and necessarily passed upon. The appellants contended that the question or controversy

over which the State Labor Relations Board asserted jurisdiction is covered by the National Labor Relations Act and is within the exclusive jurisdiction of the National Labor Relations Board; and that the exclusive character of the jurisdiction of the Federal government in such cases derives from the provisions of Article I, Section 8, and Article VI, Clause 2, of the Constitution of the United States. This court rejected that contention."

And the Supreme Court, Erie County, State of New York, is hereby requested to direct its Clerk to return said remit- [fol. 88] titur to this Court for amendment accordingly.

Further Ordered that the stay be and the same hereby is continued.

Raymond J. Cannon, Deputy Clerk. (Seal of Court of Appeals.)

[fol. 89] In Court of Appeals of New York

[Title omitted]

Petition for Appeal, Assignment of Errors and Prayer for Reversal

To the Honorable John T. Loughran, Chief Judge of the Court of Appeals of the State of New York:

Your petitioners, Bethlehem Steel Company, Edward F. Entwisle, Chauncey L. Baker, William H. Peters, Jr., and J. Driscoll DeWitt, Respondents-Appellants in the above-entitled cause (hereinafter together called the Petitioners), respectfully show by this petition, and the Assignment of Errors filed herewith, that in the records, proceedings and decision of this Court in the above-entitled cause, this Court being the highest court of the State of New York in which a decision could be had in said cause, and said decision being a final judgment, manifest error has occurred, greatly to the damage of the Petitioners, in that, as appears in said records and proceedings, there was drawn in question the validity of a statute of the State of New York on the ground of its being repugnant to the Constitution or laws of the [fol. 90] United States, and the final judgment of this Court is in favor of the validity of said statute, which statute is

The New York State Labor Relations Act (Laws of 1937, Chapter 443; as amended by Laws of 1942, Chapter 518; 30 McKinney's Consolidated Laws of New York, §§ 700-716).

Wherefore your Petitioners hereby respectfully pray that they be permitted to take an appeal to the Supreme Court of the United States from the final judgment of this Court, made and entered in the above-entitled cause on November 29, 1945, for the reasons specified in the Assignment of Errors accompanying this petition; that a proper order be made with regard to the appeal bond to be given by the Petitioners; that a citation issue as provided by law; and that the material parts of the record, proceedings and papers upon which said final judgment was based, duly authenticated, be sent to the Supreme Court of the United States in accordance with the rules in such case made and provided.

ASSIGNMENT OF ERRORS

Your Petitioners complain that the Court of Appeals of the State of New York committed manifest error to the prejudice of your Petitioners in the above-entitled cause and assign the following errors in the record and proceedings herein upon which they will rely on their appeal to the Supreme Court of the United States (each numbered paragraph being a separate assignment of error):

I. The Court of Appeals of the State of New York erred in rejecting the contention of your Petitioners [fol. 91] that the question or controversy over which the New York State Labor Relations Board sought to assert jurisdiction under the New York State Labor Relations Act in the proceeding before said Board in which were issued the subpoena *duces tecum* and subpoenas which said Board sought to enforce in this cause is a question or controversy exclusively within the jurisdiction of the National Labor Relations Board under the National Labor Relations Act and is not within the jurisdiction of the New York State Labor Relations Board under the New York State Labor Relations Act.

II. The Court of Appeals of the State of New York erred in failing and refusing to hold that under the provisions of Section 8 of Article I and Clause 2 of Article VI of the Constitution of the United States the New

York State Labor Relations Act cannot have any lawful application to the aforesaid question or controversy.

III. The Court of Appeals of the State of New York erred in affirming the order of the Supreme Court of the State of New York for the County of Erie which was made and entered in this cause on March 1, 1945.

IV. The Court of Appeals of the State of New York erred in failing and refusing to reverse said order of the Supreme Court of the State of New York for the County of Erie and to direct that the application of [fol. 92] Petitioner-Respondent in this cause for the enforcement of its subpoena *duces tecum* and subpoenas be denied.

V. The Court of Appeals of the State of New York erred in affirming the order of the Appellate Division of the Supreme Court for the Fourth Judicial Department of the State of New York which was made and entered in this cause on May 2, 1945, and which affirmed the aforesaid order of the Supreme Court of the State of New York for the County of Erie.

VI. The Court of Appeals of the State of New York erred in failing and refusing to reverse said order of the Appellate Division of the Supreme Court for the Fourth Judicial Department of the State of New York.

PRAYER FOR REVERSAL

Wherefore, your Petitioners pray that the said final judgment of this Court, made and entered on November 29, 1945, in the above-entitled cause, be reversed and a judgment rendered in favor of your Petitioners, with costs, and for such other and further relief as to this Court may seem just and proper.

February 16th, 1946.

Cravath, Swaine & Moore, 15 Broad Street, New York, N. Y.; Kenefick, Cooke, Mitchell, Bass & Letchworth, Marine Trust Building, Buffalo, N. Y., Attorneys for the Respondents-Appellants.

Daniel J. Kenefick, C. A. McLain, Bruce Bromley, of Counsel.

[fol. 93] IN COURT OF APPEALS OF NEW YORK

[Title omitted]

ORDER ALLOWING APPEAL

Bethlehem Steel Company, Edward E. Entwisle, Chauncey L. Baker, William H. Peters, Jr. and J. Driscoll DeWitt, Respondents-Appellants in the above-entitled cause, having filed their Petition for Appeal, praying that they be permitted to take an appeal to the Supreme Court of the United States from the final judgment of this Court, made and entered in said cause on November 29, 1945, and having also made and filed with said Petition their Assignment of Errors, Prayer for Reversal, and their Statement as to Jurisdiction, it is hereby

Ordered that said appeal be, and the same hereby is, allowed as prayed for, and that an appeal bond in the sum of $500.00 be filed by or on behalf of said Respondents-Appellants, with good and sufficient surety.

February 16th, 1946.

John T. Loughran, Chief Judge of the Court of Appeals of the State of New York.

[fols. 94-96] Citation in usual form showing service on William E. Grady, Jr., omitted in printing.

[fols. 97-98] Bond on Appeal for $500.00 omitted in printing.

[fol. 99] IN SUPREME COURT OF NEW YORK, COUNTY OF ERIE

[Title omitted]

PRAECIPE FOR TRANSCRIPT OF RECORD

To the Clerk of the Above-Named Court:

In connection with the preparation of the transcript of record on appeal herein the respondents request that you prepare and include as part of such transcript the following

and certify the same to the Supreme Court of the United States:

1. All of the papers included in the printed papers on appeal to the Court of Appeals of the State of New York certified by you on May 29, 1945, and now on file in your office and attached to the Remittitur, as amended, of the Court of Appeals of the State of New York.

2. Remittitur (Judgment) of Court of Appeals of the State of New York dated November 29, 1945.

3. Order of Court of Appeals of the State of New York dated December 7, 1945, amending Remittitur.

4. Order of the Supreme Court of the State of New York, County of Erie, dated January 7, 1946, making the order [fols. 100-102] and judgment of the Court of Appeals of the State of New York, as amended, the order and judgment of the Supreme Court of the State of New York, County of Erie.

5. Petition for Appeal, Assignment of Errors and Prayer for Reversal.

6. Order Allowing Appeal.

7. Statement as to Jurisdiction.

8. Notice calling attention to the provisions of Supreme Court Rule 12(3).

9. Citation on Appeal.

10. Appeal Bond.

11. Proof of service.

12. This Praecipe and proof of service thereof.

February 18, 1946.

Yours, etc., Cravath, Swaine & Moore, 15 Broad Street, New York, N. Y.; Kenefick, Cooke, Mitchell, Bass & Letchworth, Marine Trust Building, Buffalo, N. Y., Attorneys for the Respondents.

To: William E. Grady, Jr., 250 West 57th Street, New York, N. Y., Attorney for the Petitioner.

Acknowledgment of Service

Service of a copy of the foregoing Praecipe is acknowledged this 19th day of February, 1946.

William E. Grady, Jr., Counsel for Petitioner.

[fol. 103] SUPREME COURT OF THE UNITED STATES

STATEMENT OF POINTS AND DESIGNATION—Filed March 15, 1946

Appellants, pursuant to the provisions of Paragraph 9 of Rule 13 of the Rules of the Supreme Court of the United States, state that the points upon which they intend to rely in said Court in this case are as follows:

1. Appellants hereby adopt their Assignment of Errors as and for their Statement of Points upon which they intend to rely in this case.

Appellants hereby designate for the record in this case each and every paper enumerated in their Praecipe dated February 18, 1946, and served and filed herein, as necessary for the consideration thereof.

March 13, 1946.

Bruce Bromley, Counsel for Appellants, 15 Broad Street, New York 5, N. Y.

To: William E. Grady, Jr., Esq., Counsel for Appellee, 250 West 57th Street, New York, N. Y.

[fol. 104] ACKNOWLEDGMENT OF SERVICE

Service of a copy of the foregoing Statement of Points and Designation is hereby acknowledged this 14th day of March, 1946.

William E. Grady, Jr., Counsel for Appellee, by Hilda Abramson, Secretary.

[fol. 104½] [File endorsement omitted.]

[fol. 105] SUPREME COURT OF THE UNITED STATES

ORDER NOTING PROBABLE JURISDICTION—April 22, 1946

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted and the case is consolidated with No. 1048, Allegheny Ludlum Steel Corporation vs. Kelley et al. for argument. The Solicitor General of the United States is requested to

file a brief as *amicus curiae* and, if so advised, to participate in the oral argument.

Mr. Justice Jackson took no part in the consideration or decision of this order.

Endorsed on cover: File No. 50,644. New York Court of Appeals. Term No. 55. Bethlehem Steel Company, Edward F. Entwisle, Chauncey L. Baker, William H. Peters, Jr., and J. Driscoll DeWitt, Appellants, vs. New York State Labor Relations Board. Filed March 12, 1946. Term No. 55, O. T., 1946.

Act would be repugnant to the provisions of the Constitution and laws of the United States as an invalid interference with commerce among the several states.

By an order of Mr. Justice Paul J. Batt made at a Special Term of said Supreme Court the Company was directed to produce such documents and evidence pursuant to said subpoena *duces tecum* and the individual appellants were directed to testify and give evidence before the State Board pursuant to said subpoenas which were directed to them, respectively (R. 2). Said order of said Supreme Court was affirmed without opinion by the Appellate Division of the Supreme Court of the State of New York (R. 60). The final decree of the Court of Appeals of the State of New York, a review of which is here sought, affirms said order of said Appellate Division (R. 62).

The petition for appeal to this Court was presented to the Honorable John T. Loughran, Chief Judge of the Court of Appeals of the State of New York on February 16, 1946, and the appeal was allowed on that date (R. 64, 67).

The State Board Proceeding

The State Board proceeding, in which such subpoena *duces tecum* and subpoenas were issued, is a proceeding brought by the State Board under Section 705 of the State Act for the investigation and certification of representatives for the purposes of collective bargaining of certain supervisory employees at the Lackawanna Plant of the Company. The State Board proceeding arose out of an amended petition filed on or about October 20, 1944, with the State Board by Foreman's Association of America, Bethlehem Chapter 50, for the certification under Section 705 of the State Act of that Association as the exclusive collective bargaining representative of employees of the Company in an alleged appropriate unit consisting of foremen, general foremen

and supervisors, exclusive of superintendents, at the Lackawanna Plant. In said petition, the Foreman's Association claimed to represent a majority of the persons in said unit (R. 37, 48, 57).

The Company

The Company is a Pennsylvania corporation licensed to do business in the State of New York. It is engaged, among other things, in the production and sale of steel and steel products. It owns and operates plants engaged in the production of steel and steel products in the States of New York (including the Lackawanna Plant), Pennsylvania, Maryland, California and Washington. Its Lackawanna Plant is the only plant involved in the State Board proceeding. The Company employs at such plant approximately 11,100 persons, of whom approximately 650 are included in the supervisory classifications which the Foreman's Association seeks to represent (R. 38).

During the calendar year 1943, the Company produced at the Lackawanna Plant finished steel products valued in excess of $122,000,000, of which more than 80% was shipped from such plant to points outside the State of New York. More than 90% (in value) of all raw materials used at the Lackawanna Plant during 1943 was delivered to such plant from points outside the State of New York (R. 38).

The Foreman's Association

The Foreman's Association, according to its constitution, is a voluntary association of supervisory employees. One of its stated purposes is "to confer and act upon measures for the protection and advancement of the economic welfare of supervisory employees through collective bargaining." Under its constitution it admits to membership "Any employee of good moral character, whose duties require the supervision of other employees, or who directs work, who may or

may not supervise other employees, and who is not a member of any other organization recognized by his employer as representing him in collective bargaining" (R. 48).

SPECIFICATION OF ERRORS TO BE URGED

The Court of Appeals of the State of New York erred:

1. In rejecting the contention of appellants that the question or controversy over which the New York State Labor Relations Board sought to assert jurisdiction under the New York State Labor Relations Act in the proceeding before said Board in which were issued the subpoena *duces tecum* and subpoenas which said Board sought to enforce in this case is a question or controversy exclusively within the jurisdiction of the National Labor Relations Board under the National Labor Relations Act and is not within the jurisdiction of the New York State Labor Relations Board under the New York State Labor Relations Act.

2. In failing and refusing to hold that under the provisions of Section 8 of Article I and Clause 2 of Article VI of the Constitution of the United States the New York State Labor Relations Act cannot have any lawful application to the aforesaid question or controversy.

SUMMARY OF ARGUMENT

I

The appellants contend that the National Act applies to any controversy with regard to the representation of the Company's supervisory personnel at its Lackawanna Plant. The Company manufactures steel and steel products with plants in five states. During the calendar year 1943, more than 80% of the finished steel products produced at its Lackawanna Plant was shipped in interstate commerce and more than 90% of all raw materials used at that plant was delivered from points outside the State of New York. The National Board has already applied the National Act in

five different cases to five different groups of the Company's employees at the Lackawanna Plant. The National Board has held that supervisors are employees within the meaning of that term as used in the National Act. Finally, it was established as a matter of fact in the proceedings below that, if the Foreman's Association had filed with the National Board a petition for certification under Section 9 of the National Act, the National Board would have assumed jurisdiction and would have determined the controversy regarding such representation on its merits. In this connection it is important to note that the employer has no right, power or status to invoke the jurisdiction of the National Board.

II

The appellants contend that the State Board does not have jurisdiction over the subject matter of the State Board proceeding because such subject matter is governed exclusively by the National Act. Since the provisions of the National Act apply to the controversy involved in the State Board proceeding, the State Act cannot have any application to such question and the State Board does not, therefore, have any jurisdiction to determine it. The exclusive character of the jurisdiction of the Federal Government derives from the provisions of the United States Constitution, Article I, Section 8, and Article VI, Clause 2. The effect of those Constitutional provisions is to invalidate any state regulation which attempts to cover the same ground as is covered by a valid regulation of the Federal Government in pursuance of its power over interstate commerce.

The purpose of Congress in enacting the National Act was to regulate interstate labor relations by a national agency as a national problem on a national scale. Since both Acts cover precisely the same field, the State Act should be held unconstitutional when sought to be applied to interstate labor relations. The fact that there are differing and con-

flicting provisions in the two Acts reinforces the conclusion of unconstitutionality. While the rulings of the State Board under the State Act are now in conformity with the rulings of the National Board with respect to foremen, they have not been so in the past and there is no assurance of conformity in the future. The fact that the National Board has taken jurisdiction over the matter of the representation of certain of the Company's employees at the Lackawanna Plant is a sufficient exercise of the Federal jurisdiction to exclude state interference with respect to other of the Company's employees at such plant.

ARGUMENT

The central issue in this case is the narrow and important question of whether in the circumstances here disclosed the State Board can constitutionally act with respect to a certain class of employees in interstate commerce as to which the National Board has not acted. The fact that both Acts cover precisely the same field, with various conflicting provisions, however, as to permissible units of representation, would seem to dispose of the question against the existence of state power. When there is added to that legislative conflict the danger of conflicting administrative policy, which latter conflict has existed in the past and may exist in the future, together with the assumption of jurisdiction over some of the Company's employees by the National Board, the conclusion of unconstitutionality becomes inescapable.

POINT I

THE NATIONAL ACT APPLIES TO ANY QUESTION OR CONTROVERSY WITH REGARD TO THE REPRESENTATION OF THE SUPERVISORY PERSONNEL AT THE LACKAWANNA PLANT FOR THE PURPOSES OF COLLECTIVE BARGAINING WITH THE COMPANY.

The National Board has heretofore determined in five cases that the National Act applies to the Lackawanna

Plant and to questions or controversies concerning the representation of employees of the Company at that Plant (R. 51).

Matter of Bethlehem Steel Corporation, Bethlehem Steel Company, and South Buffalo Railway Co. and Steel Workers Organizing Committee, Local Union 1024, C. I. O., 30 N.L.R.B. 1006, 32 N.L.R.B. 264 (1941), (production and maintenance employees);

Matter of Bethlehem Steel Corporation and Bethlehem Steel Company and American Federation of Labor, 47 N.L.R.B. 1330 (1943), (plant protection employees);

Matter of Bethlehem Steel Corporation and Bethlehem Steel Company and United Steelworkers of America, C. I. O., District 4, 52 N.L.R.B. 1217 (1943), (order department employees);

Matter of Bethlehem Steel Company and American Federation of Labor, Federal Local 23332, 55 N.L.R.B. 658 (1944), (fire department employees);

Matter of Bethlehem Steel Company and United Steelworkers of America, C. I. O., Cases Nos. 3-R-1145, 3-R-1146 (1946), (clerical employees, mechanical strip mill).

In each of such cases the National Board held that a question concerning the representation of certain employees of the Company at its Lackawanna Plant was a question affecting commerce within the meaning of the National Act. In each case, after directing and conducting an election among such employees, the National Board certified, pursuant to the provisions of subsection (a) of Section 9 of the National Act, that a named labor organization was the exclusive representative of the employees concerned for the purposes of collective bargaining.

Furthermore the National Board has held that supervisors are employees within the meaning of the term "employees" as it is used in the National Act. *Matter of Soss*

Manufacturing Co. and Foreman's Association of America, 56 N.L.R.B. 348 (1944); *Matter of Republic Steel Corp. and Foreman's Association of America*, 56 N.L.R.B. 348 (1944); *Matter of Packard Motor Car Company and Foreman's Association of America*, 61 N.L.R.B. 4, 64 N.L.R.B. 1212 (1945); see also *National Labor Relations Board v. Skinner & Kennedy Stationery Company*, 113 F. (2d) 667 (C. C. A. 8th, 1940); *National Labor Relations Board v. Packard Motor Car Company*, F. (2d) , (C. C. A. 6th, August 12, 1946).

The State Board itself introduced and there was received in evidence in the State Board proceeding in this case a letter from the Regional Director of the National Board for the Third Region to the State Board in which it was stated that, if the Foreman's Association had filed with the National Board a petition under Section 9 of the National Act for the investigation and certification of representatives of the supervisory employees here involved, the National Board would have assumed jurisdiction over such petition and would have determined on its merits the question or controversy regarding such representation. In that letter the Regional Director said, in part (R. 56):

> "***I did state that if in the event a petition had been or were to be filed by the Foremen's Association with respect to seeking certification for the company's supervisory employees, in view of the Maryland Drydock decision, this office would not have proceeded to certification thereon and would have refused to issue notice of hearing (in other words, dismissed the petition). However, I did not state that the national board 'would refuse jurisdiction.' Accepting a petition and then dismissing, as you know, is quite different from refusing to take jurisdiction. Inasmuch as the Bethlehem Steel Company is engaged in interstate commerce, if the Foremen's Association had filed a petition with the national board, the petition would have been accepted and docketed.

> Thereafter, under present Board policy we would have proceeded to refuse to issue notice of hearing in this matter on the merit basis that supervisory employees do not comprise an appropriate bargaining unit." (Underscoring added.)

There can, therefore, be no doubt that the question or controversy over which the State Board in the State Board proceeding seeks to assert jurisdiction is covered by the National Act and is within the jurisdiction of the National Board.

POINT II

THE STATE BOARD DOES NOT HAVE JURISDICTION OVER THE SUBJECT-MATTER OF THE STATE BOARD PROCEEDING, BECAUSE SUCH SUBJECT-MATTER IS GOVERNED EXCLUSIVELY BY THE NATIONAL LABOR RELATIONS ACT.

The provisions of the National Act authorize the determination by the National Board of the question or controversy concerning the representation of supervisory employees at the Lackawanna Plant over which the State Board in the State Board proceeding has sought to take jurisdiction under the State Act. That being so, the State Act cannot have any application to such question or controversy and the State Board does not, therefore, have jurisdiction to determine such question or controversy.

The exclusive character of the jurisdiction of the Federal Government in such cases derives from the provisions of the United States Constitution which confer upon the Congress the power "To regulate Commerce with foreign Nations, and among the several States" (Article I, Section 8), and which expressly provide in the following language for the supremacy of the Constitution and of the laws of the United States made thereunder (Article VI, Clause 2):

> "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; . . . shall be the supreme Law of the Land; and the

> Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

The effect of those Constitutional provisions is to invalidate any State regulation which attempts to cover the same ground as is covered by a valid regulation of the Federal Government in pursuance of its power over interstate commerce.

A. The Purpose of Congress in Enacting the National Act Was to Regulate Interstate Labor Relations by a National Agency as a National Problem on a National Scale.

The Federal Government was first in the field, the National Act having been approved on July 5, 1935, while the State Act was not approved by the Governor of the State of New York until May 20, 1937.

The declared purpose of the National Act, as shown in its first section, is to encourage collective bargaining, and to protect the "full freedom" of workers in the selection of bargaining representatives of their own choice. The National Act formulated a comprehensive scheme for the regulation of labor relations. At the time the National Act was adopted there was no State regulation in the field. There is no reason to believe that the adoption of such Act constituted an invitation to the States to adopt similar legislation of their own covering employees in interstate commerce.

Prior to the passage of the National Act employers frequently refused to recognize that particular unions were authorized to represent the employees they claimed as members and the strike was in many cases the only method by which the union could prove its authority to speak. The sections of the National Act with which we are here concerned were designed to provide a means of ending, in so far as possible, any uncertainty as to whether a given union represented those employees for whom it claimed the right to speak. The position taken by the State Board that it may

conduct certification proceedings among employees engaged in interstate commerce would not add to the certainty and uniformity which the National Act seeks to produce. Conflicts must result if a minority, dissatisfied with being grouped in a particular unit by one Board, applies to the other Board, and is by that Board certified as an appropriate bargaining unit. Chaotic conditions would result from the shopping around which would inevitably result, if it be determined that both Boards have concurrent jurisdiction. Stability in labor relations will not result, if a determination by one Board upon the basis of which contracts are entered into may be upset at will by a determination of another Board with supposedly concurrent jurisdiction upon an application to it by the members of one of the contracting parties. The employer cannot remedy the situation by making direct application to the National Board since its rules do not permit such application. No principle of *res judicata* can mitigate this situation, since the controversy regarding representation can always be treated as a new controversy by the competing Board.

It cannot be supposed that the Congress intended to make possible the chaotic condition which the State Board suggests. It is apparent that the Congress intended that the National Board should have exclusive jurisdiction of certification proceedings affecting employees in interstate commerce. If the creation of the National Board was a step necessary to insure the free flow of commerce that flow will necessarily be impeded by the intrusion of the State Board into a field in which the National Board may exercise its discretion.

Since the National Act is broad enough in scope to cover the entire problem of certification of bargaining agents for units of employees engaged in interstate commerce, and since the National Act sets up what has proved to be adequate machinery for this purpose, and since at the time the National Act was passed the States had not set up any ma-

chinery for conducting certification proceedings, it is clear that the Congress did intend to occupy the field.

There can be no doubt that the National Act and the State Act, as the State Board seeks to apply it, can not "move freely within the orbits of their respective purposes without impinging upon one another" (*Union Brokerage Co. v. Jensen*, 322 U. S. 202, 207 (1944)).

The Supreme Court has, indeed, specifically stated that the National Act was addressed to a national problem which it intended to solve upon a national scale.

National Labor Relations Board v. Hearst Publications, Inc., 322 U. S. 111, 123 (1944).

Since the National Act is "intended to solve a national problem on a national scale", there would not seem to be any excuse whatever for permitting the State to attempt to assume the functions of the National Board and thereby to interfere with the orderly administration of the National Act. In *Southern Pacific Co. v. State of Arizona*, 325 U. S. 761 (1945), Mr. Justice Stone, writing for the majority, said in part (at page 767):

> "But ever since *Gibbons v. Ogden*, 9 Wheat. 1, the states have not been deemed to have authority to impede substantially the free flow of commerce from state to state, or to regulate those phases of the national commerce which, because of the need of national uniformity, demand that their regulation, if any, be prescribed by a single authority."

It should be noted, moreover, as showing the intention of the Congress that the National Act should be exclusive of State regulation of the same subject matter, that, unlike other recent Federal legislation, the National Act does not contain any provision to the effect that it shall not be deemed to exclude such State regulation. If the Congress had intended that the National Act should not exclude such State regulation, it is fair to assume that the National Act would have expressly so provided. Thus, the Fair Labor

Standards Act of 1938 (29 U. S. C. § 218) specifically provides that no provision of that Act shall excuse non-compliance with any Federal or State Law establishing a minimum wage higher than the minimum wage established under such Act or a maximum work week lower than the maximum work week established under such Act. So also, the Securities Exchange Act of 1934 (15 U. S. C. § 78 bb) specifically provides that nothing in such Act shall affect the jurisdiction of the securities commission of any State over any security or person in so far as it does not conflict with the provision of such Act.*

As was indicated in *First Iowa Hydro-Electric Cooperative v. Federal Power Commission*, 327 U. S. —, 66 S. Ct. 906, 917 (1946), in order to preserve the power of the States, a Federal Act must contain an express saving clause, in a case such as the one at bar, "if the usual rules of supersedure are to be overcome."

Senator Walsh, reporting for the Committee on Education and Labor, said of the bill (S. 1958) which later became the National Labor Relations Act:

> "* * * While this bill of course does not intend to go beyond the constitutional power of Congress, as that power may be marked out by the courts, it seeks the full limit of that power in preventing these unfair labor practices." (Sen. Rep. No. 573, 74th Cong., 1st Sess., p. 19.)

Thus, the United States Supreme Court, in its decision in *Hill v. Florida*, 325 U. S. 538 (1945) held that a statute of the State of Florida requiring a business agent of a labor organization to obtain a State license before acting as such within the State was invalid, because it interfered with the "full freedom" of collective bargaining which is guaranteed to employees by the National Act.

In the case at bar the action which the State Board has

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* See also, the Investment Company Act of 1940 (15 U.S.C. § 80a-49).

taken does affect the status of the Company's employees as such and their collective bargaining rights. The intrusion of the State Board cannot be reconciled with the National Act.

It is apparent that the action of the State Board in taking jurisdiction in certification proceedings involving interstate commerce is "an obstacle to the accomplishment and execution of the full purposes and objectives of Congress" in passing the National Act (*Hines v. Davidowitz*, 312 U. S. 52, 67 (1941)).

The position of the appellants hereinbefore set forth is not inconsistent with the decision of the United States Supreme Court in *Allen-Bradley Local No. 1111, United Electrical, Radio & Machine Workers of America, et al. v. Wisconsin Employment Relations Board, et al.*, 315 U. S. 740 (1942). In that case the Wisconsin Employment Peace Act made it an unfair labor practice for an *employee* to engage in certain forms of intimidation and coercion and the Wisconsin Employment Relations Board acting pursuant to such Act had issued an order directing the Local, its officers, agents and members, to cease and desist from mass picketing, threatening employees, obstructing or interfering with the factory entrances or the free use of public roads, streets and highways and picketing the domiciles of employees. The United States Supreme Court upheld a judgment of the Supreme Court of Wisconsin affirming and enforcing such order. The Local had contested the validity of the order on the ground that the Company was subject to the National Labor Relations Act and that the Wisconsin Board had no jurisdiction in the case. The United States Supreme Court expressly limited its decision to those parts of the Wisconsin Act which prohibited the unfair labor practices in question and it expressed "no opinion as to the validity of other types of orders in cases where the federal Board has not assumed jurisdiction." Since the National Act does not purport to prohibit unfair labor practices on the part of *employees*, the

United States Supreme Court held that there was not any conflict between such provisions of the Wisconsin Act and any provisions of the National Act and that the provisions of the Wisconsin Act on which the order was based constituted a valid exercise of the police power of the State to prohibit the kinds of acts to which the order was directed. In other words, the provisions of the Wisconsin Act there in question covered a separate and different field from that which is covered by the National Act and therefore they did not interfere with or unduly burden interstate commerce.

B. Since Both Acts Cover Precisely the Same Field the State Act Should be Held Unconstitutional When Sought to be Applied to Interstate Labor Relations. The Fact That There Are Differing and Conflicting Provisions in the Two Acts Reinforces the Conclusion of Unconstitutionality.

It is clear that both Acts cover precisely the same field.

In considering the validity of a State statute which affects interstate commerce, two distinct questions are presented and must be carefully distinguished.

In the first place, the commerce clause of the Federal Constitution delegates to the Congress the power to regulate interstate commerce. In conferring that power upon the Congress the framers of the Federal Constitution intended that interstate commerce should be protected against State legislation which might obstruct the free flow of such commerce. They intended that such commerce should be subject to uniform regulations of the Federal Government in the interest of the nation as a whole and should be untrammeled by legislation of particular States which might not be in the interest of the nation as a whole.

Thus, in *Brown, et al. v. Houston, et al.*, 114 U. S. 622 (1885) Mr. Justice Bradley, delivering the opinion of the Court, said in part (at page 630):

> "The power to regulate commerce among the several States is granted to Congress in terms as abso-

lute as is the power to regulate commerce with foreign nations. If not in all respects an exclusive power; if, in the absence of Congressional action, the States may continue to regulate matters of local interest only incidentally affecting foreign and inter-State commerce, such as pilots, wharves, harbors, roads, bridges, tolls, freights, etc., still, according to the rule laid down in *Cooley v. Board of Wardens of Philadelphia*, 12 How. 299, 319, the power of Congress is exclusive wherever the matter is national in its character or admits of one uniform system or plan of regulation; and is certainly so far exclusive that no State has power to make any law or regulation which will affect the free and unrestrained intercourse and trade between the States, as Congress has left it, or which will impose any discriminating burden or tax upon the citizens or products of other States, coming or brought within its jurisdiction.***" (Underscoring added.)

Accordingly, State legislation which obstructs the free flow of interstate commerce or constitutes an undue burden upon that commerce is invalid, even if the Congress has not undertaken to legislate with regard to the particular phase of interstate commerce which is affected by such State legislation.

Thus, in *The Passenger Cases*, 7 How. 282 (1849), the United States Supreme Court held invalid a statute of the State of New York which imposed a tax upon vessels entering the Port of New York. The Court in those cases rejected the proposition that the States have a general concurrent power to regulate interstate commerce in the absence of Congressional legislation relating to the same subject as that covered by the State regulation.

On the other hand, if the Congress has not acted with regard to a proper subject of State regulation and the State regulation, although incidentally affecting interstate commerce, does not obstruct the free flow of that commerce

and does not impose an undue burden upon it, the State statute will be held valid.

Thus, in *The Minnesota Rate Cases*, 230 U. S. 352 (1913), a statute of the State of Minnesota prescribing maximum rates of charge for the carriage of passengers and freight between points within the State was upheld.

When, however, a State statute purports to regulate a subject in the field of interstate commerce which is already regulated in the same manner by an Act of the Congress, the State statute must give way and the Act of the Congress must prevail. Furthermore, by the express mandate of the Federal Constitution it becomes the duty of the judges of the State courts in cases coming before them to recognize the supremacy of the Act of the Congress and to deny enforcement of the State statute to the extent that the assertion of jurisdiction by the State under such statute comes into conflict with the exclusive jurisdiction of the Congress over the subject-matter of such statute.

Whether or not such a conflict of jurisdiction exists and the extent of any such conflict must, of course, depend on the facts of the particular case.

It is also clear that there are a number of fundamental conflicts between the provisions of the two Acts here in question.

The two Acts prescribe divergent limits within which the respective Boards may determine appropriate bargaining units. Section 9(b) of the National Labor Relations Act provides:

> "The Board shall decide in each case whether, in order to insure to employees the full benefit of their right to self-organization and to collective bargaining, and otherwise to effectuate the policies of this Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof." (Underscoring added.)

Section 705, paragraph 2, of the State Act provides:

> "The board shall decide in each case whether, in order to insure to employees the full benefit of their right to self-organization, to collective bargaining and otherwise to effectuate the policies of this article, the unit appropriate for the purposes of collective bargaining shall be the employer unit, multiple employer unit, craft unit, plant unit, or any other unit; provided, however, that in any case where the majority of employees of a particular craft shall so decide the board shall designate such craft as a unit appropriate for the purpose of collective bargaining." (Underscoring added.)

Thus the State Board has the power to designate a "multiple employer unit" or "any other unit" as appropriate. The power granted by the Congress to the National Board is not so wide. In fact, the Conference Report (House Report No. 1731) of the Senate and House of Representatives on the bill (S. 1958) which later became the National Act clearly shows that by House Amendment No. 11 the phrase "or other unit" was eliminated from Section 9(b) because it would allow too wide a choice of types of units (*Congressional Record*, June 27, 1935, 74th Cong., 1st Sess., Vol. 79, Part 9, pp. 10259, 10298-10299).

In some other respects, however, the State Board is more limited than the National Board. The latter, for example, may determine the proper unit to be "the employer unit, craft unit, plant unit, or subdivision thereof." The State Board, however, cannot determine that the appropriate unit is other than a craft unit, if a majority of the employees of a particular craft vote for a craft unit.

The most important respect in which the State Board is limited in its desig ation of an appropriate unit lies in its inability to designate an employer unit where the employer also has plants in other states, as in the instant case. An "employer unit", under the terms of both the State and

the National Acts, is one of the units which may be found to be appropriate. But if an employer's plants are in more than one state, the National Board can, but the State Board can *not*, certify an employer unit; because the State Board cannot have jurisdiction over employees in other states.

The two Acts also differ in the purposes and policies declared in each of them. The differing policies behind each Act are binding upon the respective Boards, and in each Act their effectuation is explicitly required to be the basis of a decision with respect to an appropriate bargaining unit. Section 1 of the National Act provides, in part:

> "It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred . . ."

Section 700 of the State Act, after stating the finding of the Legislature that the denial of the right to organize and refusal to recognize the procedure of collective bargaining lead to strikes, lockouts and other forms of industrial strife and unrest which are inimical to the public safety and welfare, and frequently endanger the public health," declares:

> "This article shall be deemed an exercise of the police power of the state for the protection of the public welfare, prosperity, health and peace of the people of the state."

Thus, there may be conflicting decisions as to whether a unit is appropriate, depending upon whether the deciding Board seeks "to eliminate the causes of certain substantial obstructions to the free flow of commerce" or to protect "the public welfare, prosperity, health and peace of the people". The National Act is designed to preserve "the balance of economic forces upon which the full flow of commerce depends" (Senate Report No. 573, 74th Cong., 1st Sess., p. 19; *Cf. National Labor Relations Board v. Jones & Laughlin Steel Corp.*, 301 U. S. 1, 31-32 (1937)).

Thus, aside from the legislative differences, there must of necessity be a difference in the approach of the two Boards by reason of their differing situations. The National Board must view the problem to be solved from a national standpoint, in the light of experience on a national scale, and with considerations of a national scope in mind (*Cf. National Labor Relations Board v. Hearst Publications, Inc.*, 322 U. S. 111, 123 (1944)). The State Board's duty and inclinations can not extend beyond the State's borders.

Another source of conflict between the State and National Acts lies in the fact that the decisions as to the appropriate unit in each case are left to administrative bodies. The decision as to what is an appropriate bargaining unit is more than a mere determination of fact. It involves the exercise of discretion (*May Department Stores Co. v. National Labor Relations Board*, 326 U. S. 376 (1945); *National Labor Relations Board v. Hearst Publications, Inc.*, 322 U. S. 111, 134 (1944)). It involves administrative policy and the constant revision and adaptation of such policy to changing circumstances and changing views with respect to expediency. To expect the two different Boards in such eddying circumstances to render similar decisions is to rely upon coincidence. That such coincidence does not always occur is shown by actual experience. The State Board's early determinations* that supervisory employees can constitute an appropriate bargaining unit were in direct conflict with the National Board's former *Maryland Drydock Company* (49 N.L.R.B. 733 (1943)) doctrine (*infra*, p. 34).

Finally, there is conflict between the two Acts in the very fact that they establish two different Boards charged with the duty of determining appropriate bargaining units for the purposes of collective bargaining.

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*See, e.g., *Matter of Williamsburgh Power Plant Corp.*, 1 N.Y.S.L.R.B. 653 (1938).

The very existence of the State Act, the Congress having preempted the field by enacting the National Act, is, of itself, and coupled with the past differences in policies of the two Boards, sufficient conflict to invalidate the State Act. In the words of Mr. Chief Justice White, in *New York Central R.R. Co. v. Board of Chosen Freeholders of the County of Hudson*, 227 U. S. 248, 264 (1913):

> "The conception of the operation at one and the same time of both the power of Congress and the power of the States over a matter of interstate commerce is inconceivable, since the exertion of the greater power necessarily takes possession of the field, and leaves nothing upon which the lesser power may operate."

In such a conflict the State Act must give way, even were there no conflicting Board decisions or policies. When the Congress has properly outlined the jurisdiction of the National Board, attempts by the State to invade that jurisdiction are unconstitutional.

Further, the conflict arising from the establishment of the two different Boards lies in the burden which would be placed upon interstate commerce and those engaged therein by such a dual system of regulation. Though the State Act by itself might not be an improper burden upon interstate commerce, the imposition of the State Act on top of the National Act is a real burden. In *Houston v. Moore*, 5 Wheat. 1 (1820), where there was involved a Pennsylvania statute penalizing failure to serve in the militia when so ordered by the President, an offense already punishable under Federal law, Mr. Justice Washington said, in part (at pages 22-23):

> "This question does not so much involve a contest for power between the two governments, as the rights and privileges of the citizen, secured to him by the constitution of the United States, the benefit of which he may lawfully claim. If, in a specified case, the people have thought proper to bestow certain powers on congress, as the safest depositary of them,

and congress has legislated within the scope of them, the people have reason to complain, that the same powers should be exercised at the same time by the state legislatures. To subject them to the operation of two laws upon the same subject, dictated by distinct wills, particularly in a case inflicting pains and penalties, is, to my apprehension, something very much like oppression, if not worse. In short, I am altogether incapable of comprehending how two distinct wills can, at the same time, be exercised in relation to the same subject, to be effectual, and at the same time, compatible with each other. If they correspond in every respect, then the latter is idle and inoperative; if they differ, they must, in the nature of things, oppose each other, so far as they do differ. If the one imposes a certain punishment, for a certain offence, the presumption is, that this was deemed sufficient, and, under all circumstances, the only proper one. If the other legislature impose a different punishment, in kind or degree, I am at a loss to conceive, how they can both consist harmoniously together."

Subjection to the operation of two laws upon the same subject, dictated by distinct wills, is burdensome and oppressive.

". . . The state statute and the national law operate upon the same subject-matter, and prescribe different rules concerning it. The national law is unquestionably one within the competency of Congress to enact under the power given to regulate commerce between the States. The state statute must, therefore, give way." (*Gulf, Colorado & Santa Fé Ry. Co. v. Hefley*, 158 U.S. 98, 105 (1895), per Brewer, J.)

There are many cases in which the courts have refused to enforce a State statute which was held to impinge upon the exclusive jurisdiction of the Congress over the field of interstate commerce.

Thus, in *Gulf, Colorado & Santa Fé Ry. Co. v. Hefley*, 158 U.S. 98 (1895), the United States Supreme Court held that

a Texas statute making it unlawful for a railroad to collect a greater sum for transporting goods than the amount specified in the bill of lading covering the shipment could not be validly applied to an interstate shipment.

In *Northern Pacific Railway Co. v. State of Washington*, 222 U.S. 370 (1912), the United States Supreme Court held invalid a State law regulating hours of service of railway employees, the provisions of which the Court stated "greatly resembled" those of an Act of the Congress which had been passed but was not to take effect until a subsequent date.

In *Second Employers' Liability Cases*, 223 U. S. 1 (1912) the United States Supreme Court held that the Federal Employers' Liability Act superseded the laws of the States in so far as they purported to cover the same field.

In *Chicago, Rock Island & Pacific Railway Company v. Hardwick Farmers Elevator Company*, 226 U.S. 426 (1913), the United States Supreme Court held invalid a State statute which made it the duty of a carrier on demand by a shipper to furnish cars for transportation of freight within 72 hours after such demand. The Hepburn Act, passed by the Congress, also impressed a duty on carriers to provide and furnish transportation upon reasonable request. The Court held that the State statute was invalid.

In *St. Louis, Iron Mountain & Southern Railway Company v. Edwards*, 227 U. S. 265 (1913), the issue was the enforceability of penalties imposed under an Arkansas statute which required carriers to give notice to consignees of the arrival of freight. The Federal Hepburn Act imposed a duty upon the carriers to deliver freight to consignees. The United States Supreme Court held that penalties imposed under the State statute in respect of interstate shipments were unenforceable.

In *Erie R.R. Co. v. New York*, 233 U. S. 671 (1914), a statute of the State of New York, which limited the hours

of work of railroad employees to less than that allowed by the Federal Hours of Service Act was held unconstitutional in so far as it applied to interstate commerce.

In *Southern Ry. Co. v. Railroad Commission of Indiana*, 236 U. S. 439 (1915), the United States Supreme Court held invalid a regulation of the State of Indiana which required every carrier properly to equip its cars with grab-irons and hand-holds. The Federal Safety Appliance Act also required carriers to equip their cars with hand-holds. The Court declared that the Indiana regulation was invalid.

In *Pennsylvania Railroad Company v. Public Service Commission of Pennsylvania*, 250 U. S. 566 (1919), the Railroad operated a train in interstate commerce, the last car of which was not equipped with a platform as required by the Pennsylvania Public Service Commission, acting under a Pennsylvania statute. The car was, however, constructed in accordance with the regulations of the Post Office Department and the Interstate Commerce Commission. The Supreme Court of the United States set aside a conviction of the Railroad for a violation of the State law on the ground that the Federal law was supreme and that compliance with it was sufficient.

In *Napier v. Atlantic Coast Line Railroad Company*, 272 U. S. 605 (1926), requirements of a Georgia statute regarding an automatic door to the firebox on locomotives and of the Wisconsin Railroad Commission regarding curtains on locomotive cabs, were held invalid because they went beyond the equipment required by the Interstate Commerce Commission. It was admitted in that case that the State requirements were imposed in the exercise of the police power of the States and that devices prescribed by the States would protect the enginemen and also indirectly increase the safety of all those on the train and even others. Nevertheless, the railroads were held not bound to comply with the State requirements.

In *Consolidated Edison Co. v. National Labor Relations Board*, 305 U. S. 197 (1938), the principal question was whether the National Board had jurisdiction over the Consolidated Edison Company, the operations of which were wholly within New York State, but which affected interstate commerce. The Company argued that the legislature of the State of New York had adopted a State labor relations act (the Act the validity of which is here questioned) which comprehensively and adequately provided protection against the interruption of the Company's services through labor disputes. This argument was rejected and the Company was held subject to the jurisdiction of the National Board, the Court, through Mr. Chief Justice Hughes, saying, in part (at page 223):

> "It is manifest that the enactment of this state law could not override the constitutional authority of the Federal Government. The State could not add to or detract from that authority."

In *Cloverleaf Butter Co. v. Patterson, Commissioner of Agriculture and Industries of Alabama*, 315 U. S. 148 (1942), state authorities were enjoined from confiscating renovated butter in plaintiff's factory or warehouses in Alabama or otherwise interfering with plaintiff's reprocessing of such butter which was moving in interstate commerce, because under Federal legislation the Federal Department of Agriculture had authority to safeguard the consumer's interests throughout the process of manufacture and distribution, including the supervision of the sanitation of the plants and the workers, inspecting the ingredients and confiscating the finished product when unwholesome.

In the recent case of *Hill v. Florida*, 325 U. S. 538 (1945), a Florida statute was held invalid on the ground that it circumscribed the "full freedom" of choice of collective bargaining agents which is secured to employees by the National Labor Relations Act.

In *Public Utilities Commission of Ohio, et al. v. United Fuel Gas Co., et al.*, 317 U. S. 456 (1943), the United States Supreme Court affirmed a decree of the United States District Court for the Southern District of Ohio enjoining the enforcement of orders of the Public Utilities Commission of Ohio requiring United Fuel Gas Company to prepare and present to such Commission "all pertinent and relevant testimony and exhibits tending to prove a reasonable and just rate to be charged by it to the Portsmouth Gas Company for the furnishing of natural gas for distribution within the City of Portsmouth, Ohio."

That case is especially pertinent here, because there as in the instant case an administrative agency of the State was seeking to compel the production of evidence in a controversy in respect of which such agency did not have jurisdiction to act.

In *Oregon-Washington Railroad & Navigation Co. v. Washington*, 270 U. S. 87 (1926), the contention was made that, in the absence of an exercise by the Secretary of Agriculture of his statutory power to impose a quarantine on diseased and insect-carrying trees and plants in interstate commerce, the State of Washington could effect a quarantine of alfalfa to prevent the threatened spreading of a particular type of weevil. This contention the Court rejected, on the ground that the passage of the Federal quarantine law prevented or suspended the power of the States to act.

The National Board itself has held that a State Act must yield before the paramount authority of the Congress expressed in a valid and applicable Federal law (*Matter of Eppinger & Russell Company and Florida Citrus & Allied Workers Union Local 4A, U.C.A.P.A.W.A., C.I.O.*, 56 N.L.R.B. 1259 (1944)).

In that case an employer before the National Board defended its refusal to bargain with a duly selected repre-

sentative of its employees on the ground that the representative had not secured a Florida license as a business agent (see *Hill v. Florida*, 325 U. S. 538 (1945)).

In rejecting the employer's argument the National Board said in part (at page 1260):

> "* * * There is no question but that the National Labor Relations Act constitutionally applies to this respondent, and hence the sole inquiry must be whether Congress meant that the duty of employers to bargain, as provided in Section 8(5) of the Act, should turn on the requirements of such State legislation. No doubt Congress could have so provided, even though this would have subjected the enforcement of legislation national in scope to the varied and perhaps conflicting provisions of State enactments; but we find nothing in the language of the Act or its legislative history which warrants the belief that Congress in fact did so provide. We therefore conclude that the respondent's contention is without merit. * * *"

In its decision the National Board relied upon the following cases:

Hines v. Davidowitz,
312 U. S. 52 (1941);
Cloverleaf Butter Co. v. Patterson,
315 U. S. 148 (1942);
Napier v. Atlantic Coast Line Railroad Company,
272 U. S. 605 (1926);
Oregon-Washington Railroad & Navigation Co. v. State of Washington,
270 U. S. 87 (1926);
Charleston & W. C. Railway Co. v. Varnville Furniture Co.,
237 U. S. 597 (1915);
National Labor Relations Board v. Hearst Publications, Inc.,
322 U. S. 111 (1944).

In *Matter of Evinrude Motors Division of Outboard Marine and Manufacturing Company and United Steel-*

workers of America, C.I.O., Case No. 13-R-5236, 66 N.L.R.B. No. 138 (March 25, 1946), the National Board took jurisdiction of a case for the determination of a bargaining unit although the Wisconsin Employment Relations Board had already made a determination. The National Board pointed out that, under Wisconsin law, the Wisconsin Board was required to establish a craft unit if a craft group existed among the employees involved. The National Act, however, makes the existence of a craft only one of the factors in the determination of an appropriate unit. The National Board established an industrial unit despite the prior establishment by the Wisconsin Board of a craft unit, holding that the National Board must prevail over the Wisconsin Board.

There are many other cases in which the United States Supreme Court has refused to enforce State statutes that were held to infringe upon the exclusive jurisdiction of the Congress over the field of interstate commerce. Among such cases are the following:

Southern Railway Co. v. Reid,
222 U. S. 424 (1912);
Adams Express Company v. Croninger,
226 U. S. 491 (1913);
New York Central Railroad Company v. Winfield,
244 U. S. 147 (1917);
Missouri Pacific Railroad Company v. Stroud,
267 U. S. 404 (1925);
Missouri Pacific Railroad Company v. Porter, et al.,
273 U. S. 341 (1927);
Hines v. Davidowitz,
312 U. S. 52 (1941);
Illinois Natural Gas Co. v. Central Illinois Public Service Co., et al.,
314 U. S. 498 (1942).

From the foregoing cases it is apparent that the police power of the State of New York would warrant the application of the State Act to the labor relations of the Company if the National Act were not in existence (*The Minnesota Rate Cases*, 230 U. S. 352 (1913)). On the other hand, it is

equally well settled that when there is a conflict between a statute enacted by the Congress pursuant to its delegated powers and a law adopted by the State in the exercise of its police powers, then the former prevails (*Gibbons v. Ogden*, 9 Wheat. 1 (1824); *Erie R.R. Co. v. New York*, 233 U. S. 671 (1914)).

It has long been recognized that, in those fields of commerce where national uniformity is not essential, either the State or Federal government may act (*Willson v. Black-bird Creek Marsh Co.*, 2 Pet. 245 (1829); *California v. Thompson*, 313 U. S. 109 (1941)).

In cases where there is only a partial exercise of Federal regulation, the State may legislate freely upon those phases of the commerce which are left unregulated by the Nation (*Merchants Exchange of St. Louis v. Missouri*, 248 U. S. 365 (1919); *Welch Co. v. New Hampshire*, 306 U. S. 79 (1939)).

But when the United States exercises its power of legislation, State legislation on the same subject becomes inoperative and the Federal legislation is exclusive in its application (*Napier v. Atlantic Coast Line Railroad Company*, 272 U. S. 605 (1926); *Illinois Natural Gas Co. v. Central Illinois Public Service Co.*, 314 U. S. 498 (1942)). It follows logically, therefore, that in the absence of affirmative consent a Congressional negative should be presumed in the courts against state action when the Congress has previously acted (see Dowling, *Interstate Commerce and State Power* (1940), 27 Va. L. Rev. 1, 20).

C. The Rulings of the State Board Under the State Act Have Not in the Past Been in Conformity With the Rulings of the National Board With Respect to Foremen and There Is No Assurance of Conformity in the Future.

The fact that the State Act purports to apply to a controversy within the scope of the National Act gives rise to the very danger of interference with the jurisdiction of the Congress over interstate commerce which Clause 2 of

Article VI of the Federal Constitution is intended to prevent. Experience has demonstrated that, when two separate governmental agencies seek to apply two separate statutes to the same kind of controversies, inconsistencies and confusion are bound to result.

Thus, the State Board has repeatedly held that, under the provisions of Section 705 of the State Act, supervisory employees constitute a unit appropriate for the purposes of collective bargaining and that the establishment of such collective bargaining units will effectuate the policies of the State Act.

> *Matter of Williamsburgh Power Plant Corp.*, 1 N.Y.S.L.R.B. 653 (1938);
> *Matter of Siegel & Fried, Inc.*, 3 N.Y.S.L.R.B. 150 (1940);
> *Matter of Metropolitan Life Insurance Company*, 6 N.Y.S.L.R.B. 751 (1943).

The National Board, on the other hand, held until recently that, under the provisions of Section 9 of the National Act, supervisory employees did not constitute a unit appropriate for the purposes of collective bargaining. (*Matter of The Maryland Drydock Company and Local No. 31 of the Industrial Union of Marine and Shipbuilding Workers of America*, 49 N.L.R.B. 733 (1943)).

In that case the National Board dismissed petitions for the investigation and certification of representatives of supervisory employees on the ground that such employees did not constitute a unit appropriate for the purposes of collective bargaining. The National Board said, in part (at pages 741 to 742):

> "The legislative history of the National Labor Relations Act indicates that the conditions which prevailed in the mass production industries were the primary factors which led to its enactment. In these industries it was traditionally recognized by all parties that the interests of foremen lay predominantly with the management groups. We are of the opinion

that in the present stage of industrial administration and employee self-organization, the establishment of bargaining units composed of supervisors exercising substantial managerial authority will impede the processes of collective bargaining, disrupt established managerial and production techniques, and militate against effectuation of the policies of the Act. To the extent that our decisions in the *Union Collieries, Godchaux Sugar*, and subsequent cases are inconsistent with this opinion, they are hereby overruled. ***" (Underscoring added.)

That interpretation and application of the provisions of Section 9 of the National Act was reaffirmed by the National Board in a number of subsequent decisions:

Matter of Boeing Aircraft Company and Association of Aircraft General Foremen, et al., 51 N.L.R.B. 67 (1943);

Matter of General Motors Corporation and Foreman's Association of America, 51 N.L.R.B. 457 (1943);

Matter of Capital City Telephone Company and Local B-2, International Brotherhood of Electrical Workers, A.F.L., 56 N.L.R.B. 1200 (1944).

In the *General Motors* case above cited, in which the Foreman's Association was the petitioner, the National Board said, in part (at pages 459, 460):

"It is urged that the doctrine established in the *Maryland Drydock* case should be limited to the fact situation therein presented and that the instant case be differentiated on the ground that the union seeking to represent the supervisory employees is an independent labor organization not affiliated with the union which represents the production and maintenance employees. We have given careful consideration to this contention but are not persuaded that the factors militating against the establishment of units of supervisory employees, set forth in our decision in the *Maryland Drydock* case, are obviated by the cir-

cumstance that the union seeking to represent such employees is an independent, unaffiliated union. ***"

In a decision handed down on March 26, 1945, in *Matter of Packard Motor Car Company and Foreman's Association of America*, 61 N.L.R.B. 4, the National Board, to some extent, at least, overruled its decision in the *Maryland Drydock* case and found that "all general foremen, foremen, assistant foremen, and special assignment men employed by the Company at its plants in Detroit, Michigan, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act." That decision did not, however, entirely eliminate the conflict between the rulings of the State Board and those of the National Board. The State Board has held that supervisory employees may designate as their collective bargaining agency a labor organization that represents the non-supervisory employees of their employer.* The National Board specifically left that question open in its decision in the *Packard Motor Car Company* case, and only recently aligned its policy with that of the State Board (*Jones & Laughlin Steel Corporation, Vesta-Shannopin Coal Division and United Clerical, Technical and Supervisory Employees Union of the Mining Industry, Division of District 50, United Mine Workers of America*, 66 N.L.R.B. No. 51, (March 8, 1946)).

The Circuit Court of Appeals for the 6th Circuit, however, has recently indicated that a union which represents the production employees of a company for the purposes of collective bargaining cannot, under the National Act, properly represent the supervisory employees of such com-

* See, e.g. *Matter of Metropolitan Life Insurance Co.*, 6 N.Y.S.L.R.B. 751 (1943); *Matter of Delparke Realty Corp.*, 6 N.Y.S.L.R.B. 905 (1943); *Matter of Bee Line, Inc.*, 6 N.Y.S.L.R.B. 686 (1943).

pany. In *National Labor Relations Board v. Packard Motor Car Company,* F. (2d) (August 12, 1946), the Court said in part:

> "Since the union involved is independent and neither a part of nor controlled by the union representing the production workers, we also uphold the decision as to the propriety of the exclusive bargaining representative named by the Board. This is a situation diametrically opposite to that presented in Jones & Laughlin Steel Corp. v. National Labor Relations Board, *supra*, where the bargaining agent designated was the identical union which represented the production workers. As found by the panel of the War Labor Board, it is not appropriate for supervisors who are responsible for discipline, assignment of work, rate adjustments and promotions, who represent the employers in handling grievances of rank and file workers, and who generally represent higher management in dealing with the rank and file workers, to be subject to discipline by a union which is controlled directly or indirectly by the men whom they supervise. The effectiveness of management requires that it have its own uncontrolled agents to represent it in dealing with the rank and file, just as the rank and file are entitled to have their own uncontrolled representatives for dealing with higher management."

As an example of another conflict between the National Act and the State Act, the State Board in a proceeding under the State Act has included guards, patrolmen and watchmen in a unit certified to be appropriate for the purposes of collective bargaining (*Matter of Knickerbocker Village, Inc., et al.*, 5 N.Y.S.L.R.B. 23 (1942); *Matter of Empire State, Inc.*, 5 N.Y.S.L.R.B. 692 (1942)).

The Federal Courts, however, construing the National Act, have held that guards are not "employees" within the meaning of the National Act (*National Labor Relations Board v. E. C. Atkins & Co.*, 147 F. (2d) 730 (C.C.A. 7th, 1945); 325 U. S. 838 (1945); 155 F. (2d) 567 (C.C.A. 7th,

1946); cert. applied for August 20, 1946), and that they do not constitute an appropriate unit within the meaning of such Act (*National Labor Relations Board v. Jones & Laughlin Steel Corporation*, 146 F. (2d) 718 (C.C.A. 6th, 1945); 325 U. S. 838 (1945); 154 F. (2d) 932 (C.C.A. 6th, 1946); cert. applied for August 20, 1946).

While at the moment, therefore, certain of the interpretations which the State Board has placed on the State Act are consistent with the interpretations which the National Board has placed on the National Act, other rulings of the State Board under the State Act are in conflict with the provisions of the National Act as interpreted by the Federal Courts. Moreover, there is no assurance of conformity of any of such interpretations in the future.

D. The National Board Has Taken Jurisdiction Over the Matter of the Representation of the Company's Employees at Its Lackawanna Plant.

In the instant case, the record shows affirmatively that, if the Foreman's Association had filed with the National Board a petition for the investigation and certification of representatives of the supervisory employees here involved, the National Board would have assumed jurisdiction of such petition and of the question or controversy here under investigation by the State Board (R. 56).

As we have pointed out, *supra*, page 10, the National Board has heretofore determined in five cases that the National Act applies to the Lackawanna Plant and to questions or controversies concerning the representation of certain non-supervisory employees of the Company at that Plant (R. 51).

By such determinations the National Board has ousted the State Board of jurisdiction to determine any controversy with respect to the representation for the purposes of collective bargaining of any employees of the Company.

Such exercise of jurisdiction over non-supervisory employees is an assumption of jurisdiction over the foremen as well. The collective bargaining process is not so simple as to make possible the separate consideration of the bargaining rights of rank-and-file employees and those of their immediate supervisors. The foremen are drawn from the rank-and-file and they may return to such group. The National Board cannot determine an appropriate unit for the rank-and-file without considering the rights and position of the foremen. In fact, foremen and other supervisors were, by name, expressly excluded from the units which the National Board determined to be appropriate in those cases. In so far as a particular plant is concerned, the status of one group of employees cannot be considered without consideration of the whole nexus of employer-employee relationships in such plant.

The National Board has also determined that the National Act applies to other plants owned and operated by the Company in other parts of the country and has established a pattern of bargaining units under the National Act with regard to all of the plants owned and operated by the Company (see, e.g. *Matter of Bethlehem Steel Company and United Steelworkers of America, C.I.O.*, 50 N.L.R.B. 713 (1943); *Matter of Bethlehem Steel Company and Local 1845, United Steelworkers of America, C.I.O.*, 46 N.L.R.B. 794 (1943)).

Moreover, the fact that the two Acts may be similar in their language and that the result in any particular case would be the same under either Act does not resolve the conflict of jurisdiction between the Federal government and the State government. That conflict arises from the fact that the two Acts purport to cover the same ground and apply to the same controversy. That conflict can only be resolved, as the Constitution of the United States provides, by recognizing the supremacy of the National Act and

denying to the State Act any application to the particular controversy.

This is not a case in which the State Board is attempting to enforce a Federal statute. The State Board here seeks to apply the State Act to a controversy which clearly falls within the scope of the National Act and in such a case the Federal Constitution provides that the National Act is supreme and, therefore, must have exclusive application.

CONCLUSION

It is, therefore, submitted that the State Act cannot properly be construed so as to confer upon the State Board jurisdiction over the subject-matter of the State Board proceeding, because, if the State Act should be so construed, it would be contrary to the provisions of Section 8 of Article I and Clause 2 of Article VI of the Constitution of the United States. Accordingly, the Orders appealed from should be reversed and the application of the State Board herein for an order enforcing its subpoena *duces tecum* and subpoenas should be denied with costs, because the State Board does not have jurisdiction over the subject-matter of the State Board proceeding.

Respectfully submitted,

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October 21, 1946.

APPENDIX A

PERTINENT PROVISIONS OF THE NEW YORK STATE LABOR RELATIONS ACT

(Laws of 1937, Chapter 443; amend. Laws of 1942, Chapter 518)

700. Findings and policy.

The economic necessity for employees to possess full freedom of association, actual liberty of contract and bargaining power equal to that of their employers, who are frequently organized in corporate or other forms of association, has long been sanctioned by public opinion, and recognized and affirmed by legislatures and the highest courts. As the modern industrial system has progressed, there has developed between and among employees and employers an ever greater economic interdependence and community of interest which have become matters of vital public concern. Employers and employees have recognized that the peaceable practice and wholesome development of that relationship and interest are materially aided by the general adoption and advancement of the procedure and practice of bargaining collectively as between equals. It is in the public interest that equality of bargaining power be established and maintained. It is likewise recognized that the denial by some employers of the right of employees freely to organize and the resultant refusal to accept the procedure of collective bargaining, substantially and adversely affect the interest of employees, other employers, and the public in general. Such denial creates variations and instability in competitive wage rates and working conditions within and between industries and between employees and employers engaged in such industries, and by depressing the purchasing power of wage earners and the profits of business, and tends (a) to produce and aggravate recurrent business depressions, (b) to increase the dis-

parity between production and consumption, (c) to create unemployment with its attendant dangers to the health, peace and morale of the people, and (d) to increase public and private expenditures for relief of the needy and the unemployed.

When some employers deny the right of employees to full freedom of association and organization, and refuse to recognize the practice and procedure of collective bargaining, their actions lead to strikes, lockouts and other forms of industrial strife and unrest which are inimical to the public safety and welfare, and frequently endanger the public health.

Experience has proved that protection by law of the right of employees to organize and bargain collectively, removes certain recognized sources of industrial strife and unrest, encourages practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours or other working conditions, and tends to restore equality of bargaining power between and among employers and employees, thereby advancing the interests of employers as well as employees.

In the interpretation and application of this article, and otherwise, it is hereby declared to be the public policy of the state to encourage the practice and procedure of collective bargaining, and to protect employees in the exercise of full freedom of association, self-organization and designation of representatives of their own choosing for the purposes of collective bargaining, or other mutual aid and protection, free from the interference, restraint or coercion of their employers.

All the provisions of this article shall be liberally construed for the accomplishment of this purpose.

This article shall be deemed an exercise of the police power of the state for the protection of the public welfare,

prosperity, health and peace of the people of the state. (As amended by Chapter 689 of the Laws of 1940.)

701. Definitions.

When used in this article:

1. The term "person" includes one or more individuals, partnerships, associations, corporations, legal representatives, trustees, trustees in bankruptcy, or receivers.

2. The term "employer" includes any person acting on behalf of or in the interest of an employer, directly or indirectly, with or without his knowledge, but a labor organization or any officer or agent thereof shall only be considered an employer with respect to individuals employed by such organization.

3. The term "employees" includes but is not restricted to any individual employed by a labor organization; any individual whose employment has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment; and shall not be limited to the employees of a particular employer, unless the article explicitly states otherwise, but shall not include any individual employed by his parent or spouse or in the domestic service of any person in his home, or any individuals employed only for the duration of a labor dispute, or any individuals employed as farm laborers.

4. The term "representatives" includes a labor organization or an individual whether or not employed by the employer of those whom he represents.

5. The term "labor organization" means any organization which exists and is constituted for the purpose, in whole or in part, of collective bargaining, or of dealing with employers concerning grievances, terms or conditions of employment, or of other mutual aid or protection and which is not a company union as defined herein.

6. The term "company union" means any committee, employee representation plan or association of employees which exists for the purpose, in whole or in part, of dealing with employers concerning grievances or terms and conditions of employment, which the employer has initiated or created or whose initiation or creation he has suggested, participated in or in the formulation of whose governing rules or policies or the conducting of whose management, operations or elections, the employer participates in or supervises or which the employer maintains, finances, controls, dominates, or assists in maintaining or financing, whether by compensating anyone for services performed in its behalf or by donating free services, equipment, materials, office or meeting space or anything else of value, or by any other means.

7. The term "unfair labor practice" means only those unfair labor practices listed in section seven hundred four.

8. The term "labor dispute" includes, but is not restricted to, any controversy between employers and employees or their representatives as defined in this section concerning terms, tenure or conditions of employment or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to negotiate, fix, maintain or change terms or conditions of employment, or concerning the violation of any of the rights granted or affirmed by this article, regardless of whether the disputants stand in the proximate relation of employer and employee.

9. The term "board" means the labor relations board created by section seven hundred two.

10. The term "policies of this article" means the policies set forth in section seven hundred.

703. Rights of employees.

Employees shall have the right of self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing,

and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection, free from interference, restraint, or coercion of employers, but nothing contained in this article shall be interpreted to prohibit employees from exercising the right to confer with their employer at any time, provided that during such conference there is no attempt by the employer, directly or indirectly, to interfere with, restrain or coerce employees in the exercise of the rights guaranteed by this section. (As amended by Chapter 773 of the Laws of 1940.)

704. Unfair labor practices.

It shall be an unfair labor practice for an employer:

1. To spy upon or keep under surveillance, whether directly or through agents or any other person, any activities of employees or their representatives in the exercise of the rights guaranteed by section seven hundred three.

2. To prepare, maintain, distribute or circulate any blacklist of individuals for the purpose of preventing any of such individuals from obtaining or retaining employment because of the exercise by such individuals of any of the rights guaranteed by section seven hundred three.

3. To dominate or interfere with the formation, existence, or administration of any employee organization or association, agency or plan which exists in whole or in part for the purpose of dealing with employers concerning terms or conditions of employment, labor disputes or grievances, or to contribute financial or other support to any such organization, by any means, including but not limited to the following: (a) by participating or assisting in, supervising, controlling or dominating (1) the initiation or creation of any such employee organization or association, agency, or plan, or (2) the meetings, management, operation, elections, formulation or amendment of constitution, rules or policies, of any such employee organization or association, agency or plan; (b) by urging the employees to join any such

employee organization or association, agency or plan for the purpose of encouraging membership in the same; (c) by compensating any employee or individual for services performed in behalf of any such employee organization or association, agency or plan, or by donating free services, equipment, materials, office or meeting space or anything else of value for the use of any such employee organization or association, agency or plan; provided that, an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay.

4. To require an employee or one seeking employment, as a condition of employment, to join any company union or to refrain from forming, or joining or assisting a labor organization of his own choosing.

5. To encourage membership in any company union or discourage membership in any labor organization, by discrimination in regard to hire or tenure or in any term or condition of employment: Provided that nothing in this article shall preclude an employer from making an agreement with a labor organization requiring as a condition of employment membership therein, if such labor organization is the representative of employees as provided in section seven hundred five.

6. To refuse to bargain collectively with the representatives of employees, subject to the provisions of section seven hundred five.

7. To refuse to discuss grievances with representatives of employees, subject to the provisions of section seven hundred five.

8. To discharge or otherwise discriminate against an employee because he has signed or filed any affidavit, petition or complaint or given any information or testimony under this article.

9. To distribute or circulate any blacklist of individuals exercising any right created or confirmed by this article or of members of a labor organization, or to inform any person of the exercise by any individual of such right, or of the membership of any

individual in a labor organization for the purpose of preventing individuals so blacklisted or so named from obtaining or retaining employment.

10. To do any acts, other than those already enumerated in this section, which interfere with, restrain or coerce employees in the exercise of the rights guaranteed by section seven hundred three.

705. Representatives and elections.

1. Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes or by the majority of the employees voting in an election conducted pursuant to this section shall be the exclusive representatives of all the employees in the appropriate unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: Provided, that employees, directly or through representatives, shall have the right at any time to present grievances to their employer.

2. The board shall decide in each case whether, in order to insure to employees the full benefit of their right to self-organization, to collective bargaining and otherwise to effectuate the policies of this article, the unit appropriate for the purposes of collective bargaining shall be the employer unit, multiple employer unit, craft unit, plant unit, or any other unit; provided, however, that in any case where the majority of employees of a particular craft shall so decide the board shall designate such craft as a unit appropriate for the purpose of collective bargaining.

3. Whenever it is alleged by an employee or his representative, or by an employer or his representative, that there is a question or controversy concerning representation of employees, the board shall investigate such question or controversy and certify in writing to all persons concerned the name or names of the representatives who have been designated or selected. In any such investigation the board shall provide for an appropriate hearing upon due notice,

either in conjunction with a proceeding under section seven hundred six or otherwise, and may conduct an election by secret ballot of employees, or use any other suitable method to ascertain such representatives (either before or after the aforesaid hearing), provided, however, that the board shall not have authority to investigate any question or controversy between individuals or groups within the same labor organization or between labor organizations affiliated with the same parent labor organization.

4. The board shall have power to determine who may participate in the election and to establish the rules governing any such election: Provided, that no election need be directed by the board solely because of the request of an employer or of employees prompted thereto by their employer, nor shall any individuals employed only for the duration of a strike or lockout be eligible to vote in such election; and provided further, that no such election shall be conducted under the employer's supervision, or, except as may be required by the board, on the employer's property, during working hours, or with his participation or assistance.

708. Investigatory powers.

For the purpose of all hearings and investigations, which, in the opinion of the board, are necessary and proper for the exercise of the powers vested in it by sections seven hundred five and seven hundred six,

1. The board, or its duly authorized agents or agencies, shall at all reasonable times have access to, for the purposes of examination, and the right to examine, copy or photograph any evidence, including payrolls or lists of employees, of any person being investigated or proceeded against that relates to any matter under investigation or in question. Any member of the board shall have power to issue subpoenas requiring the attendance and testimony of witnesses and the production of any evidence that relates to any matter under investigation or in question before the board, its member, agent, or agency, conducting the hearing or investigation. Any member of the

board, or any agent or agency designated by the board for such purposes, may administer oaths and affirmations, examine witnesses and receive evidence.

2. If any witness resides outside the state, or through illness or other cause is unable to testify before the board or its member, agent, or agency conducting the hearing or investigation, his or her testimony or deposition may be taken within or without this state, in such manner and in such form as the board or its member, agent or agency conducting the hearing may by special order or general rule prescribe.

3. In case of contumacy or refusal to obey a subpoena issued to any person the supreme court of any county within the jurisdiction of which the inquiry is carried on or within the jurisdiction of which said person guilty of contumacy or refusal to obey is found or resides or transacts business, upon application by the board shall have jurisdiction to issue to such person an order requiring such person to appear before the board, its member, agent, or agency, there to produce evidence if so ordered, or there to give testimony touching the matter under investigation or in question; and any failure to obey such order of the court may be punished by said court as a contempt thereof.

4. No person shall be excused from attending and testifying or from producing books, records, correspondence, documents or other evidence in obedience to the subpoena of the board, on the ground that the testimony or evidence required of him may tend to incriminate him or subject him to a penalty or forfeiture; but no individual shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he is compelled, after having claimed his privilege against self-incrimination, to testify or produce evidence, except that such individual so testifying shall not be exempt from prosecution and punishment for perjury committed in so testifying.

5. Complaints, orders, and other process and papers of the board, its member, agent, or agency,

may be served either personally or by registered mail or by telegraph or by leaving a copy thereof at the principal office or place of business of the person required to be served. The verified return by the individual so serving the same setting forth the manner of such service shall be proof of the same, and the return post-office receipt or telegraph receipt therefor when registered and mailed or telegraphed as aforesaid shall be proof of service of the same. Witnesses summoned before the board, its member, agent, or agency shall be paid the same fees and mileage that are paid witnesses in the courts of this state, and witnesses whose depositions are taken and the person taking the same shall severally be entitled to the same fees as are paid for like services in the courts of this state.

6. All process of any court to which application may be made under this article may be served in the county wherein the person or persons required to be served reside or may be found.

7. The several departments, commissions, divisions, authorities, boards, bureaus, agencies and officers of the state or any political subdivision or agency thereof, shall furnish the board, upon its request, all records, papers, and information in their possession relating to any matter before the board.

715. Application of article.

The provisions of this article shall not apply to the employees of any employer who concedes to and agrees with the board that such employees are subject to and protected by the provisions of the national labor relations act or the federal railway labor act or to employees of the state or of any political or civil subdivision or other agency thereof, or to employees of charitable, educational or religious associations or corporations.

716. Short title.

This article shall be known and may be cited and referred to as the "New York state labor relations act."

APPENDIX B

PERTINENT PROVISIONS OF THE NATIONAL LABOR RELATIONS ACT

(49 Stat. 449)

Findings and Policy

SECTION 1. The denial by employers of the right of employees to organize and the refusal by employers to accept the procedure of collective bargaining lead to strikes and other forms of industrial strife or unrest, which have the intent or the necessary effect of burdening or obstructing commerce by (a) impairing the efficiency, safety, or operation of the instrumentalities of commerce; (b) occurring in the current of commerce; (c) materially affecting, restraining, or controlling the flow of raw materials or manufactured or processed goods from or into the channels of commerce, or the prices of such materials or goods in commerce; or (d) causing diminution of employment and wages in such volume as substantially to impair or disrupt the market for goods flowing from or into the channels of commerce.

The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association substantially burdens and affects the flow of commerce, and tends to aggravate recurrent business depressions, by depressing wage rates and the purchasing power of wage earners in industry and by preventing the stabilization of competitive wage rates and working conditions within and between industries.

Experience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury, impairment, or inter-

ruption, and promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest, by encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions, and by restoring equality of bargaining power between employers and employees.

It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce, and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

Definitions

SEC. 2. When used in this Act —

(1) The term "person" includes one or more individuals, partnerships, associations, corporations, legal representatives, trustees, trustees in bankruptcy, or receivers.

(2) The term "employer" includes any person acting in the interest of an employer, directly or indirectly, but shall not include the United States, or any State or political subdivision thereof, or any person subject to the Railway Labor Act, as amended from time to time, or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization.

(3) The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act explicity states otherwise, and shall include any individual whose

work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse.

(4) The term "representatives" includes any individual or labor organization.

(5) The term "labor organization" means any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.

(6) The term "commerce" means trade, traffic, commerce, transportation, or communication among the several States, or between the District of Columbia or any Territory of the United States and any State or other Territory, or between any foreign country and any State, Territory, or the District of Columbia, or within the District of Columbia or any Territory, or between points in the same State but through any other State or any Territory or the District of Columbia or any foreign country.

(7) The term "affecting commerce" means in commerce, or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce.

(8) The term "unfair labor practice" means any unfair labor practice listed in section 8.

(9) The term "labor dispute" includes any controversy concerning terms, tenure, or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether the

disputants stand in the proximate relation of employer and employee.

(10) The term "National Labor Relations Board" means the National Labor Relations Board created by section 3 of this Act.

(11) The term "old Board" means the National Labor Relations Board established by Executive Order Numbered 6763 of the President on June 29, 1934, pursuant to Public Resolution Numbered 44, approved June 19, 1934 (48 Stat. 1183), and reestablished and continued by Executive Order Numbered 7074 of the President of June 15, 1935, pursuant to Title I of the National Industrial Recovery Act (48 Stat. 195) as amended and continued by Senate Joint Resolution 133 approved June 14, 1935.

Rights of Employees

SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection.

SEC. 8. It shall be an unfair labor practice for an employer—

(1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7.

(2) To dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: *Provided*, That subject to rules and regulations made and published by the Board pursuant to section 6 (a), an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay.

(3) By discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any

labor organization: *Provided*, That nothing in this Act, or in the National Industrial Recovery Act (U. S. C., Supp. VII, title 15, secs. 701-712), as amended from time to time, or in any code or agreement approved or prescribed thereunder, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in this Act as an unfair labor practice) to require, as a condition of employment, membership therein, if such labor organization is the representative of the employees as provided in section 9 (a), in the appropriate collective bargaining unit covered by such agreement when made.

(4) To discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this Act.

(5) To refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9 (a).

Representatives and Elections

SEC. 9. (a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: *Provided*, That any individual employee or a group of employees shall have the right at any time to present grievances to their employer.

(b) The Board shall decide in each case whether, in order to insure to employees the full benefit of their right to self-organization and to collective bargaining, and otherwise to effectuate the policies of this Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof.

(c) Whenever a question affecting commerce arises concerning the representation of employees, the Board may investigate such controversy and certify to the parties, in writing, the name or names of the representatives that have been designated or selected. In any such investigation, the Board shall provide for an appropriate hearing upon due notice, either in conjunction with a proceeding under section 10 or otherwise, and may take a secret ballot of employees, or utilize any other suitable method to ascertain such representatives.

(d) Whenever an order of the Board made pursuant to section 10 (c) is based in whole or in part upon facts certified following an investigation pursuant to subsection (c) of this section, and there is a petition for the enforcement or review of such order, such certification and the record of such investigation shall be included in the transcript of the entire record required to be filed under subsections 10 (e) or 10 (f), and thereupon the decree of the court enforcing, modifying, or setting aside in whole or in part the order of the Board shall be made and entered upon the pleadings, testimony, and proceedings set forth in such transcript.

SEC. 16. This Act may be cited as the "National Labor Relations Act."

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CHARLES ELMORE CROPLEY

IN THE

Supreme Court of the United States

OCTOBER TERM—1946

Nos. 55, 76

BETHLEHEM STEEL COMPANY, *et al.*, *Appellants*,

v.

NEW YORK STATE LABOR RELATIONS BOARD.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK.

THE ALLEGHENY LUDLUM STEEL CORPORATION, *Appellant*,

v.

WILLIAM J. KELLEY, *et al.*, Constituting the State Labor Relations Board of the State of New York.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF NEW YORK FOR THE COUNTY OF CHAUTAUQUA.

BRIEF FOR APPELLEES KELLEY, *ET AL.*, CONSTITUTING THE NEW YORK STATE LABOR RELATIONS BOARD

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INDEX

	PAGE
Opinions Below	2
Jurisdiction	2
Proceedings Below	3
Statutes Involved	3
Statement	3
The Issue	5
Summary of Argument	7
Argument:	
I. The National Labor Relations Act does not preclude state legislation consistent therewith	12
A. The National Act shows no intent to debar consistent state legislation	12
1. Congressional intent to bar state police power legislation must be clearly manifested	13
2. The National Act contains no provision prohibiting consistent state legislation	14
3. The absence of a saving clause in the National Act is of no significance	17
4. Congress has acquiesced in judicial and administrative construction that consistent state Acts lawfully stand together with the National Act	18
B. The National Act does not relate to an exclusively national field	19

PAGE

II. The New York Act does not conflict with the National Act, either in terms or as here applied.... 37

A. The New York Act is "the State's equivalent" of the National Act..... 37

B. No real question of conflict is involved.. 39

1. Types of appropriate bargaining units..... 39

2. Different sovereignties 42

3. Discretionary powers 43

C. The *Maryland Drydock* decision, now moot, never gave rise to conflict..... 44

D. The New York Act as applied placed no burden on interstate commerce..... 51

III. The long-continued administrative construction and procedure of the National Board support the New York Board's concurrent jurisdiction..... 53

A. Administrative construction reinforces the New York Board's jurisdiction.... 53

B. Practical considerations support the New York Board's jurisdiction..... 62

C. Concurrent jurisdiction has not only "worked out well," but is consonant with established legal principles..... 69

Conclusion 73

Appendix A: Pertinent Provisions of the New York State Labor Relations Act..... 75

Appendix B: Pertinent Provisions of the National Labor Relations Act..... 82

Appendix C: Rules and Regulations of the National Labor Relations Board..... 87

Appendix D: List of illustrative cases affecting commerce, handled by the New York Board..... 92

Citations

PAGE

A. F. of L. v. N. L. R. B., 308 U. S. 401 47
Ala. State Federation of Labor v. McAdory, 325 U. S. 450 ..... 13, 21, 36, 39, 40, 44
Allegheny Ludlum Steel Co., In re, 9 N. Y. S. L. R. B. ——, not yet reported, Case No. WU-404, Decision No. 3519, May 29, 1946 69
Allen-Bradley Local v. Wisc. E. R. Board, 315 U. S. 740, aff'ing 237 Wisc. 146 ..... 16, 21, 33, 35, 36, 39, 53
Amalgamated Utility Workers v. Cons. Edison Co., 309 U. S. 261 49
American Emblem Co., 8 N. Y. S. L. R. B. ——, Decision No. 2923 13
Arkadelphia Milling Co. v. St. Louis S. W. R. Co., 249 U. S. 134 ..... 28, 29, 30
Assoc. Press v. N. L. R. B., 301 U. S. 103, 81 L. Ed. 953 44

Bandini Pet. Co. v. Superior Ct., 284 U. S. 8, 76 L. Ed. 136 44
Beers v. Hotchkiss, 256 N. Y. 41 60
Brewster v. Gage, 280 U. S. 327 60

Carter v. Carter Coal Co., 298 U. S. 238 ..... 25, 27, 29, 30
Charleston, etc. Ry. Co. v. Varnville, 237 U. S. 597 ..... 22, 23
Chicago & N. W. Ry. Co. v. Whitnack Produce Co., 258 U. S. 371 23
Christofel v. Wisc. E. R. Board, 243 Wisc. 332, cert. den. 320 U. S. 776 35
Cloverleaf Butter Co. v. Patterson, 315 U. S. 148 ..... 13, 24, 36
Cons. Edison Co. v. N. L. R. B., 305 U. S. 197 ..... 32, 33, 38, 53, 62

Cooley v. Port Wardens, 12 How. 299, 13 L. Ed. 996 ..... 21, 25
Creamery Package Mfg. Co., In re, N. L. R. B. Case No. XII-R-341, R-2705; Wisconsin Bd. Case III, No. 348 E-117 65

Davega City Radio, Inc. v. N. Y. S. L. R. B., 281 N. Y. 13 ..... 14, 16, 18, 23, 34, 35, 38, 42, 53, 64, 66
Davis v. Dept. of Labor, 317 U. S. 249 ..... 21, 39
Dickson v. Uhlmann Grain Co., 288 U. S. 188 ..... 21, 34, 39

PAGE

E. A. Laboratories, Inc., In re, —— N. Y. S. L. R. B. ——, not yet reported, Decision No. 2953, April 5, 1945 56
Edro Mfg. Co., In re, N. Y. Board Case No. SU-12633, SE-13863 68
Erie R. R. Co. v. N. Y., 233 U. S. 671 22
Equitable Gas Co., In re, 51 D. & C. (Pa.) 659 35
Evenrude Motors, Matter of, 66 N. L. R. B. 1142 65

Farrington v. Tenn., 95 U. S. 679, 689 16
First Iowa Hydro-Electric Co-op. v. Fed. Power Comm., 327 U. S. ——, 90 L. Ed. 855 . . . . . 17, 22
Fox River Valley Knitting Co., In re, N. L. R. B. Case No. XII-C-742, Wisconsin Bd. Case 1, No. 432 E-149 65

Geo. F. Carleton & Co., Inc., In re, 54 N. L. R. B. 222 41
Gibbons v. Ogden, 9 Wheat. 1 25
Gilman v. City of Philadelphia, 70 U. S. 713, 18 L. Ed. 96 21
Gilvary v. Cuyahoga Valley R. R. Co., 292 U. S. 57 . . 22, 36
Graybar Elec. Co. v. New Amsterdam Gas Co., 292 N. Y. 246 46
Great Atlantic & Pacific Tea Co. v. Boland (N. Y. S. L. R. B.), 176 N. Y. Misc. 258, aff'd 261 N. Y. A. D. 900 47
Great Atlantic & Pacific Tea Co., v. Grosjean, 301 U. S. 412, 81 L. Ed. 1193 44
G. Schirmer, Inc., In re, 5 N. Y. S. L. R. B. 72 54
Gulf etc. Ry. Co. v. Heftey, 158 U. S. 98 22

Harris-Upham Co., In re, —— N. Y. S. L. R. B. ——, not yet reported, Decision No. 3683, August 30, 1946, 18 LRRM 1384 . . . . . 55, 61, 64
Hicklin v. Coney, 290 U. S. 169, 78 L. Ed. 247 44
Hill v. Florida, 325 U. S. 528 15
Hill Packing Co. v. City of N. Y., —— N. Y. ——, N. Y. L. J., September 4, 1946, page 1 46
Hines v. Davidowitz, 312 U. S. 552 . . . . . 21, 22

Illinois Central R. R. Co. v. Public Utilities Comm., 245 U. S. 493 13
Industrial Assn. v. U. S., 268 U. S. 64 28

PAGE

Internat'l Union, etc. v. Wisc. Employ't Rel. Bd., —— Wisc. ——, 14 N. W. (2) 823 ..... 34, 35

Jones & Laughlin Steel Co., In re, 66 N. L. R. B. 386 .. 49
Journal News Corp., In re, 7 S. L. R. B. 295 ..... 13, 51

Kelly v. Washington, 302 U. S. 1 ..... 13, 36, 39

L. A. Young Spring & Wire Co., In re, 65 N. L. R. B. No. 59 50
Littauer v. Stern, 177 N. Y. 233 60
Louisville etc. R. R. Co. v. U. S., 282 U. S. 740 60

Maryland Drydock Company, In re, 49 N. L. R. B. 733 ..... 3, 4, 9, 44, 46, 47, 48, 49, 50, 51, 52
Maurer v. Hamilton 309 U. S. 598 13
Maynard v. Elliott, 283 U. S. 273 60
McCarey v. So. Dakota, 250 U. S. 118 15
Medo Photo Supply Corp. v. N. L. R. B., 321 U. S. 678 .. 60
Minnesota v. U. S., 305 U. S. 382 54
Mintz v. Baldwin, 289 U. S. 346 60
Missouri Pacific R. R. Co. v. Porter, 273 U. S. 341, ... 22
Mobile County v. Kimball, 102 U. S. 691, 26 L. Ed. 238 . 21
Montgomery Ward & Co., Inc.

N. L. R. B.
4 N. L. R. B. 1151 59
9 N. L. R. B. 538 59
17 N. L. R. B. 191 59
25 N. L. R. B. 318 59
29 N. L. R. B. 1170 59

N. Y. S. L. R. B.
4 N. Y. S. L. R. B. 208 59
5 N. Y. S. L. R. B. 441, enforced 179 N. Y. Misc. 298, aff'd 266 N. Y. App. Div. 876 59
5 N. Y. S. L. R. B. 1067 59
7 N. Y. S. L. R. B. 24 59

N. L. R. B. v. Falk Corp., 308 U. S. 453 47
N. L. R. B. v. Hearst Publications, 322 U. S. 111 ... 31, 32
N. L. R. B. v. I. B. E. W., 308 U. S. 413 47

PAGE

N. L. R. B. v. Jones & Laughlin Steel Corp., 301 U. S. 1 ..... 20, 24, 25, 27, 29, 30
N. L. R. B. v. Land, 103 F. 2d 815 41
Napier v. Atlantic Coast Line R. R. Co., 272 U. S. 605 .. 22
N. Y. Central etc. R. R. Co. v. Board of Chosen Freeholders, 227 U. S. 248 22
N. Y. S. L. R. B. v. Holland Laundry Inc., 294 N. Y. 480 ..... 39, 42
Northern Pacific Ry. Co. v. Washington, 222 U. S. 370 22
Norwegian Nitrogen Co. v. U. S., 288 U. S. 294 60

Oliver Iron Mining Co. v. Lord, 262 U. S. 172 28
Oregon Washington R. R. & Nav. Co. v. Washington, 270 U. S. 87 22

Packard Motor Car Co., 61 N. L. R. B. 4, enforced —— F. 2d ——, 18 LRRM 2432, petition for cert. filed October 30, 1946, 19 LRR 12 ..... 4, 5, 9, 43, 44, 45, 46, 48, 49, 50, 68
Parker v. Brown, 317 U. S. 341 ..... 21, 30
Polish National Alliance v. N. L. R. B., 322 U. S. 643 . 48, 55

R. R. Co. v. Grant, 98 U. S. 398 16
Raymier, Inc. v. Grays Harbor Division, 52 N. L. R. B. 1269 41
Reid v. Colorado, 187 U. S. 137 13

Savage Arms Corp., In re, N. L. R. B. Case No. 3-R-994 57
Savage Arms Corp., In re, 8 N. Y. S. L. R. B. 322, Dec. No. 3052 (July 14, 1945), 17 LRR 206 ..... 56, 57, 61
Savage v. Jones, 225 U. S. 501 ..... 36, 39
Schechter Poultry Corp. v. U. S., 295 U. S. 495 .. 25, 28, 29, 30
Second Employers' Liability Cases, 223 U. S. 1 22
Soss Mfg. Co., In re, 56 N. L. R. B. 348 46
Southern Ry. Co. v. Reid, 222 U. S. 424 22

United Office & Professional Workers v. Smiley, 18 LRRM 2356 65
U. S. v. Appalachian Elec. Power Co., 311 U. S. 377, 85 L. Ed. 245 44
U. S. v. Butler, 297 U. S. 1 25
U. S. v. Jackson, 280 U. S. 183 60

PAGE

U. S. v. Magnolia Pet. Co., 110 F. 2d 212 54
U. S. v. Oregon Short Line R. R. Co., 113 F. 2d 212, cert. den. 311 U. S. 679 15
Utah Power & Light Co. v. Pfost, 286 U. S. 165 ... 28, 29, 30

Vaughan Motor Co., In re, 54 N. L. R. B. 1351 48

Wallachs' Inc. v. Boland (N. Y. S. L. R. B.), 253 N. Y. App. Div. 371, aff'd 277 N. Y. 345 47
Watson v. Buck, 313 U. S. 387, 85 L. Ed. 1416 44
Welch Co. v. New Hampshire, 306 U. S. 79; 85 13
Wilson v. Black Bird Creek Marsh Co., 2 Pet. 245 25
Wilson Hurd Mfg. Co. Inc., In re, 68 N. L. R. B. 853 ... 65
Wisconsin E. R. Bd. v. Hall Garage Corp., Wisc. Circuit Ct. decided September 7, 1946, 18 LRRM 2419 .. 35
Wisconsin E. R. Bd. v. Rueping Leather Co., 228 Wisc. 473 ..... 15, 18, 27, 35n, 53, 66

York Teleph. & Tel. Co.'s Employees, In re, Pa. Ct. of Common Pleas, decided September 21, 1945, 17 LRR 175 ..... 35, 66

Statutes

National Labor Relations Act (Act of July 5, 1935, c. 372, 49 Stat. 449, 29 U. S. C., Sec. 151, *et seq.*):

Sec. 1 60
Sec. 2 (2) 4, 23, 68
Sec. 2 (3) 4, 68
Sec. 2 (7) 71
Sec. 4 (a) 72
Sec. 7 38
Sec. 9 (b) 40, 41, 42
Sec. 9 (c) 67, 71
Sec. 10 (a) 7, 14, 15
Sec. 14 15

New York State Constitution:

Article 1, Sec. 17 ..... 26, 38, 60

PAGE

New York Statutes:

New York Civil Practice Act
Article 84 26
Sec. 876a 26
New York Civil Rights Law, Sec. 17 (8 McKinney's Consolidated Laws of N. Y.) 26
New York General Business Law (19 McKinney's Consolidated Laws of N. Y.)
Sections 84, 340 (2), (3) 26
New York Judiciary Law, Sec. 753a (29 McKinney's Consolidated Laws of N. Y.) 26
New York Labor Law (30 McKinney's Consolidated Laws of N. Y.) 25, 26
New York State Labor Relations Act (Laws of 1937, Ch. 443, as amended by Laws of 1942, Ch. 518, 30 McKinney's Consolidated Laws of N. Y., Sections 700-716)
Sec. 700 ..... 42, 60
Sec. 701 (2) 4, 68
Sec. 701 (3) 4, 68
Sec. 703 38
Sec. 705 (2) 40, 41, 42
Sec. 705 (3) 43
New York Penal Law, Sections 531, 582 (39 McKinney's Consolidated Laws of N. Y.) 26
New York Public Housing Law, Sec. 152 (44a McKinney's Consolidated Laws of N. Y.) 26
New York War Emergency Act (Laws 1942, Ch. 544, Art. VI, Sec. 69) 26

Miscellaneous

PAGE

Dodd: "From Maximum to Minimum Wages: Six Centuries of Regulation of Employment Contracts." Columbia Law Review, July, 1943, Vol. XLIII, No. 5 25

Letter from John P. Boland, Chairman of New York Labor Relations Board, to J. Warren Madden, Chairman of National Labor Relations Board, dated July 12, 1937 ..... 53, 54

Letter from National Labor Relations Board to New York Labor Relations Board, dated August 15, 1946 (*Matter of Harris-Upham Co.*) 55

Letter from National Labor Relations Board to New York Labor Relations Board, dated June 5, 1946 (*Matter of E. A. Laboratories*) 56

Letter from National Labor Relations Board to New York Labor Relations Board, dated October 9, 1946 (*Matter of Edro Mfg. Co.*) 68

National Labor Relations Board:
- First Annual Report 66, 67
- Third Annual Report 60, 62
- Ninth Annual Report 41

National Labor Relations Board, Minute of August 16, 1946 55

National Labor Relations Board, Rules and Regulations
- Sections 203.46, 203.47, 203.49 66
- Sections 203.57b, 203.58a, 203.58b, 203.58c, 203.73 .. 67

Report of the Attorney General's Committee on Administrative Procedure, Monograph No. 18, "National Labor Relations Board" (1940), page 75, footnote 126 67

Senate Report 573, 74th Congress, 1st Session 14, 15, 16

Washington Daily Reporter System, Report No. 13, August 16, 1946, Bureau of National Affairs 63

IN THE

Supreme Court of the United States

OCTOBER TERM—1946

No. 55

BETHLEHEM STEEL COMPANY, *et al.*,
Appellants,

v.

NEW YORK STATE LABOR RELATIONS BOARD.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK.

No. 76

THE ALLEGHENY LUDLUM STEEL CORPORATION,
Appellant;

v.

WILLIAM J. KELLEY, *et al.*, Constituting the State Labor Relations Board of the State of New York.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF NEW YORK FOR THE COUNTY OF CHAUTAUQUA.

BRIEF FOR APPELLEES

This brief is respectfully submitted in answer to the briefs for the appellants and the brief for the United States as *amicus curiae*.

Opinions Below

In the *Bethlehem* case the opinion of the Supreme Court of the State of New York for the County of Erie (No. 55, R. 38) is not officially reported. It appears in 9 Commerce Clearing House Labor Cases, paragraph 62,611. The unanimous affirmance by the Appellate Division of the Supreme Court of the State of New York, Fourth Department, affirmed without opinion (No. 55, R. 60-1), is reported in 269 App. Div. 805. The unanimous affirmance without opinion by the Court of Appeals of the State of New York (No. 55, R. 62) is reported in 295 N. Y. 601. The order of the Court of Appeals amending its remittitur (No. 55, R. 63) is reported in 295 N. Y. 664.

In the *Allegheny* case the opinion of the Supreme Court of the State of New York for the County of Chautauqua (No. 76, R. 59-63) is reported in 184 N. Y. Misc. 47. The unanimous affirmance without opinion by the Appellate Division of the Supreme Court of the State of New York, Fourth Department (No. 76, R. 65-6), is reported in 269 App. Div. 805. The unanimous affirmance without opinion by the Court of Appeals of the State of New York (No. 76, R. 67-8) is reported in 295 N. Y. 607. The Decision and Direction of Election of the New York State Labor Relations Board in *Matter of Allegheny Ludlum Steel Corp.*, Case No. WE-373, Decision No. 2751, involved in the *Allegheny* case (No. 76, R. 20-38), is reported in 7 N. Y. S. L. R. B. 103.

No decision or direction of election has been issued by the New York State Labor Relations Board in *Matter of Bethlehem Steel Company, et al.*, Case No. WE-379.

Jurisdiction

The appellants have invoked the jurisdiction of this Court under Section 237(a) of the Judicial Code.

Proceedings Below

The course of this litigation before the New York courts and the course of the proceedings before the New York Board are sufficiently stated in the briefs of the appellants and the Solicitor General.

The original date of the filing of the petition with the New York Board in the *Bethlehem* case, however, was August 24, 1944, not October 20, 1944. The latter is the date of the filing of the amended petition (No. 55, R. 20-1, 44-5).

The New York Board has issued no decision in the proceeding involving the appellant *Bethlehem*. That proceeding is still at the hearing stage. Completion of the hearings awaits the outcome of the appellant *Bethlehem's* test of the New York Board's subpoenas at bar.

Statutes Involved

The statutes involved are the New York State Labor Relations Act, herein called the New York Act (New York Laws of 1937, Chapter 443, as amended by New York Laws of 1942, Chapter 518, 30 McKinney's Consolidated Laws of New York, Section 700-716) and the National Labor Relations Act, herein called the National Act (Act of July 5, 1935, c. 372, 49 Stat. 449, 29 U. S. C., Sec. 151, *et seq.*). The pertinent provisions of each statute are attached hereto as Appendix A and Appendix B.

The pertinent provisions of the Rules and Regulations of the National Labor Relations Board are attached as Appendix C hereto.

Statement

In 1944, during the period in which the National Board, pursuant to its decision in *Matter of Maryland Drydock Co.*, 49 N. L. R. B. 733, May 11, 1943, was refusing to process

petitions for investigation of controversies concerning representation of foremen, the appellants' foremen in New York invoked the machinery of the New York Act. The appellants asserted that their New York plants were subject only to the jurisdiction of the National Board.

The New York Board notified the National Board of the filing of the petitions and asked whether the National Board wished to take jurisdiction. The National Board answered that if the petitions had been filed with it, they would have been dismissed without hearing pursuant to its *Maryland Drydock* decision.

The National Board did not request the New York Board to refer these matters to it, or request the New York Board not to act.

A wave of recognition strikes by foremen was then in progress, many of these in war plants.

The appellants contended unsuccessfully below that their foremen are "employers" within the meaning of Section 701, subdivision 2 of the New York Act, and not "employees" within the meaning of Section 701, subdivision 3, and that their foremen could not constitute appropriate bargaining units. Section 701, subdivisions 2 and 3 of the New York Act, so far as material to that issue, are identical with Section 2, subdiviisons 2 and 3 of the National Act.

While the cases at bar were pending undetermined before the Appellate Division of the New York Supreme Court, the National Board, after public hearings, issued its decision in *Matter of Packard Motor Co.*, 61 N. L. R. B. 4, March 26, 1945, overruling the *Maryland Drydock* decision as unsound in law and an obstacle to commerce.

In the *Packard* decision the National Board reverted to the position it had maintained prior to its *Maryland Drydock* decision, and which the New York Board consistently has maintained under the New York Act, namely, that fore-

men may have recourse to the statutory machinery to obtain recognition of a foremen's labor organization as bargaining representative of an appropriate unit of foremen. The *Packard* decision pointed out that from July 1, 1943 through November, 1944, strikes by foremen in key industries had involved 131,000 employees with a loss of 669,156 man-days. Ninety-six per cent., or 642,389, of the man-days were lost as the result of strikes by foremen for recognition (61 N. L. R. B. at 13).

There were no foremen's strikes in appellants' New York plants.

Both Boards have operated under a joint understanding ever since the establishment of the New York Board in 1937. The arrangement continues to this day. Under it the National Board continues to refer to the New York Board cases involving enterprises which affect interstate commerce just as clearly as do those of the appellants. Lists of new cases filed, are exchanged by the Boards at least once a week.

The Issue

The issue which appellants seek to raise, and to which the brief of the United States as *amicus curiae* is addressed, is whether the New York Board lawfully entertained jurisdiction over the controversies concerning representation for purposes of collective bargaining, of the foremen employed in the appellants' New York plants.

That issue raises two questions: First, does the National Labor Relations Act preclude state legislation consistent therewith? Second, does the New York State Labor Relations Act as here applied, conflict with the National Act?

The courts below have disposed of both questions adversely to the appellants.

SUMMARY OF ARGUMENT

Point I

A

The National Act, though paramount, is not exclusive. While that Act is designed to deal with labor controversies which affect commerce, it does not impair New York's right to exercise its police power by legislation consistent with the National Act.

Whether a federal statute enacted pursuant to the "commerce" clause of the Constitution precludes consistent state legislation upon the same subject presents a question of Congressional intent. Congress cannot be held to have intended to bar the exercise of state police powers, even when that may be done, unless its intention to do so is clearly manifested. This canon of construction is particularly applicable where, as here, public safety, health and welfare are concerned.

The National Act shows no intention to bar consistent state Acts. It contains no prohibition, express or implied, against the enactment of state legislation upon the subject of labor relations. Section 10a of the National Act was designed to avoid the then existing diffusion of authority among *federal* agencies. The absence of a saving clause in the National Act is of no significance. At the time of the enactment of the National Act, there was no comparable state statute in existence.

Congress has acquiesced in a long-standing judicial and administrative construction that consistent state Acts lawfully stand together with the National Act.

B

The National Act does not operate in an exclusively national field. A federal statute may deal with a subject of

concern to both the federal government and to the states. But the paramountcy of the federal statute does not make it exclusive.

There is no presumption that Congress intended to occupy the field. The significance of the "field" approach lies, not in the scope of the federal statute, but in the *nature* of the field in which the statute operates, or, at most, in the nature of the statutory subject matter.

The field of labor relations, so far from being inherently national in nature, is, and traditionally has been, local in its nature, although it may also affect inter-state commerce. This is particularly true as to employment relations in manufacturing establishments within the state. The field is appropriate for the exercise of the state police power.

The New York Act, therefore, is in a permissible or concurrent field, and while the National Board has superior jurisdiction over labor controversies within the state and affecting commerce, the New York Board nevertheless has a concurrent right to exercise jurisdiction over such controversies unless and until the National Board assumes or asserts jurisdiction.

Point II

A

The New York Act does not conflict with the National Act, either in terms or as here applied. The two Acts are substantially identical. They have a common purpose.

B

No real question of conflict is involved. The alleged differences between the Acts are differences of words, not of substance.

The appropriate bargaining units here involved are plant units, a type specifically provided for in each Act. Arguments predicated on possible conflict arising out of different applications of the discretionary powers of the two Boards are speculative and may not be taken into consideration.

C

The question of alleged conflict is now moot, for the National Board's decision in *Matter of Maryland Drydock* was overruled by it in *Matter of Packard Motor Car Co.* In any event, the *Maryland Drydock* decision never gave rise to conflict between the two Boards.

D

The New York Act as here applied placed no burden on interstate commerce. On the contrary, it removed a burden therefrom.

Point III

A

Administrative construction reenforces the New York Board's jurisdiction. In 1937, the National and New York Boards adopted, and have since followed, a practical construction of the two Acts based upon concurrent jurisdiction in the New York Board and compatible with no other theory. During the nine years that have elapsed, the New York Board has exercised jurisdiction in matters affecting commerce and over which the National Board could have exercised its superior jurisdiction. In those matters, the action of the New York Board, and the consent or acquiescence of the National Board, were based on the theory of concurrent jurisdiction.

The administrative construction given to the National and New York Acts by those charged with the duty of administering them is entitled to great weight, particularly where the construction has been implemented by a course of conduct over a long period of time.

The fact that the National Board has exercised jurisdiction over rank and file employees at appellant Bethlehem's New York plant is immaterial. Bethlehem's foremen were not involved in those proceedings before the National Board. The action of the New York Board, relating to foremen, did not infringe upon the rank and file units previously established by the National Board.

B

Practical considerations support the New York Board's jurisdiction. Denial to the New York Board of concurrent jurisdiction would require discontinuance of long-standing cooperation, complicate and increase the work of both Boards, decrease their usefulness and create a twilight zone in which both Acts could be evaded with impunity.

The National Board's apprehension that concurrent jurisdiction will result in unions "shopping around" for a "favorable forum" is not supported by past experience. The National Board's asserted inability to act, if it exists, is self-imposed. The National Board, by amendment of its rules, can eliminate "shopping around," for where either the employer or the union is free to invoke the jurisdiction of the paramount national agency, the other cannot effectively select a "favorable forum."

Even without amendment of the National Board's rules, appellants herein could have invoked the jurisdiction of the National Board.

Moreover, the National Board itself could have initiated action in the cases at bar, if it had so desired.

C

The practical construction adopted and followed by the Boards, based on the theory that the New York Board has jurisdiction to act until ousted by the paramount federal power, has worked well and is consonant with established legal principles.

If the National Board desires to alter the present method of clearing cases between the two Boards, that is a matter for discussion between them. It does not constitute ground for nullifying the action of the New York Board in the cases at bar, taken with the acquiescence of the National Board, and in full accordance with the theory of concurrent jurisdiction to which both Boards consistently have adhered.

POINT I

The National Labor Relations Act does not preclude state legislation consistent therewith.

A

The National Act shows no intent to debar consistent state legislation.

The appellants Allegheny and Bethlehem, and the Solicitor General, contend in effect that the National Labor Relations Act precludes any state legislation on the same subject, even if consistent with the National Act, and that therefore the New York Act is unconstitutional insofar as it applied to labor relations in places of business or industry located within New York and affecting interstate commerce. Upon the basis of that contention, they argue that the New York Board has no jurisdiction over the controversies concerning representation of the foremen employed by the appellants at their manufacturing establishments in New York. We respectfully submit that the contention has no merit.

We contend that although the National Act is paramount, it is not exclusive. While that Act is designed to deal with labor controversies which substantially affect commerce, it does not impair New York's right to exercise its police power by legislation consistent with the National Act.

Neither the commerce clause in the Constitution nor the National Act adopted pursuant thereto, contains any words of prohibition against the enactment of state legislation upon the subject of labor relations. Since the New York Act is consistent with the National Act, the New York Board has jurisdiction to act upon a controversy concern-

ing representation arising within the state, even though the controversy affects commerce, so long as the National Board does not "assume or assert" its superior jurisdiction over the controversy. [1]

1. Congressional intent to bar state police power legislation must be clearly manifested.

The contentions of the appellants and of the Solicitor General present a question of Congressional intent as of the time of the enactment of the National Act. Under familiar principles Congress cannot be held to have intended to supersede or suspend the exercise of the police powers of the states, even when that may be done, unless its purpose to do so is clearly manifested (*Alabama State Federation of Labor* v. *McAdory*, 325 U. S. 450, 467; *Reid* v. *Colorado*, 187 U. S. 137, 148; *Kelly* v. *Washington*, 302 U. S. 1, 10-14; *Cloverleaf Butter Co.* v. *Patterson*, 315 U. S. 148, 156; *H. P. Welch Co.* v. *New Hampshire*, 306 U. S. 79, 85).

This canon of statutory construction applies even to cases involving the very instrumentalities of interstate transportation. In *Illinois Central R. Co.* v. *Public Utilities Com.*, 245 U. S. 493, this Court stated (p. 510):

> "In construing Federal statutes enacted under the power conferred by the commerce clause of the Constitution the rule is that it should never be held that Congress intends to supersede or suspend the exercise of the reserved powers of a state, even where that may be done, unless, and except so far as its purpose to do so is clearly manifested (*Reid* v. *Colorado*, 187 U. S. 137, 148; *Cummings* v. *Chicago*, 188 U. S. 410, 430; *Savage* v. *Jones*, 225 U. S. 501; *Missouri, K. & T. R. Co.* v. *Harris*, 234 U. S. 412, 419)."

That principle is "especially" applicable here where "public safety and health are concerned" (*Maurer* v. *Ham-*

1. See e. g., *Matter of Journal News Corp.*, 7 N. Y. S. L. R. B. 295, 307; *Matter of American Emblem Co.*, 8 N. Y. S. L. R. B. —, Dec. #2923, p. 3.

ilton, 309 U. S. 598, 614). The New York Act guarantees and protects the rights of employees to self-organization and collective bargaining through representatives of their own choosing and provides machinery for the peaceful exercise of those rights. The New York Act expressly provides that it "shall be deemed an exercise of the police power of the state for the protection of the public welfare, prosperity, health and peace of the people of the state" (New York Act, Section 700; *Davega-City Radio, Inc.* v. *N. Y. S. L. R. B.*, 281 N. Y. 13, 21).

2. The National Act contains no provision prohibiting consistent state legislation.

The National Act contains no reference to state legislation. The fact is, as the Solicitor General admits (Brief, p. 61), there were no comparable state acts in existence at the time of the enactment of the National Act.

The appellants and the Solicitor General, however, argue that Section 10a of the National Act, by implication, prohibits state legislation. Section 10a provides that the National Board's power to prevent the commission of unfair labor practices affecting commerce "• • • shall be exclusive, and shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, code, law, or otherwise."

The Solicitor General concedes that the Senate Committee Report (No. 573) expressly states that the purpose of Section 10a was to dispel the confusion resulting from diffusion of *federal* authority. It is then urged that the same considerations are applicable to the adoption of legislation by the several states, and, accordingly, that it is "highly unlikely" that Congress "would have" intended to permit state legislation (Solicitor General's Brief, pp. 58-61).

This line of argument is purely speculative. Congress either did, or did not, have state action in mind when it considered Section 10a. If Congress did not consider state action there could have been no Congressional intent in that regard. On the other hand, if Congress did have the states in mind, the express language of the Senate Committee Report (S. Rep. No. 573, pp. 4-5), [2] limiting the purpose of Section 10a to the prevention of diffusion of *federal* authority, clearly indicates that the section was not intended to apply to, or limit, consistent state action.

The Solicitor General suggests that the word "law" in Section 10a of the National Act "would seem" to include state law. But that argument cannot be reconciled with the admitted fact that Congress was concerned with administration only at the federal level. The word "law" cannot be carved out of context and thereby given a broader meaning than the whole of the section in which it appears. Section 10a moreover must be read in connection with Section 14 of the National Act (S. Rep. No. 573, p. 15; [3] *McCarey* v. *South Dakota*, 250 U. S. 118, 122; *U. S.* v. *Oregon Short Line R. Co.*, 113 F. 2d 212, cert. den. 311 U. S. 679). In Section 14, Congress provided that certain federal laws, insofar as they might conflict with the National Act, were superseded by the National Act. Thus it is clear that when Congress used the word "law" in Section 10a it was referring to federal law and did not contemplate state law. [4]

The plain fact is that neither Section 10a nor Section 14 of the National Act even mention state legislation. As was said in *Wisconsin Employment Relations Board* v. *Rueping Leather Co.*, 228 Wisc. 473, 483:

2. Quoted at p. 59 of the Solicitor General's brief.
3. Quoted at p. 60 of the Solicitor General's brief.
4. *Hill* v. *Florida*, 325 U. S. 538, 542, cited in the opposing briefs, did not turn upon Section 10a of the National Act. It held that the Florida statute as applied, conflicted with Section 7 of the National Act which guarantees the right of employees to bargain through representatives of their own choosing.

> "This section [section 10a of the National Act] purports to deal not with the scope of the Act, but with the powers and jurisdiction of the National Labor Relations Board with respect to its administration. Its purpose is therefore presumably to establish the exclusive character of the Board's powers of administration as contrasted with other federal boards and agencies which might otherwise be thought to have like jurisdiction."

The New York Court of Appeals so held in *Davega-City Radio* v. *New York State Labor Relations Board*, 281 N. Y. 13. The Court said (p. 24):

> "That the National Labor Relations Board is given exclusive jurisdiction under the National act is of significance only in fixing the appropriate agency to enforce the National act, and is not relevant to the question whether a consistent State law may coexist with a National act."

If Congress had intended to preclude enactment of similar state legislation, it would have been easy for it to have used clear language to that effect. Congress could have provided very simply that where the National Act applies, no state legislation may apply. But Congress did not so provide (*R. R. Co.* v. *Grant*, 98 U. S. 398; *Farrington* v. *Tenn.*, 95 U. S. 679, 689).

Speculation as to what Congress might have contemplated is not permissible as a criterion of Congressional intent. As we have pointed out above, this Court has insisted that Congressional intent to preclude the exercise of state police power must be clearly manifested. Indeed, in this very field of labor relations this Court said in *Allen-Bradley Local, etc.* v. *Wisconsin Employment Relations Board*, 315 U. S. 740, 749:

> "We will not lightly infer that Congress by the mere passage of a federal Act has impaired the traditional sovereignty of the several States in that regard."

3. The absence of a saving clause in the National Act is of no significance.

The appellants argue that the fact that the National Act contains no saving clause evidences a Congressional intent to exclude state legislation (*Allegheny Ludlum* Brief, p. 16; *Bethlehem Steel* Brief, p. 16). The argument is without merit. The absence of a saving clause in favor of state legislation has no significance, for as the Solicitor General admits (Brief, pp. 60-1), there was no comparable state legislation in existence at the time of enactment of the National Act.

Moreover, the appellants' argument cannot be reconciled with the requirement that to exclude the exercise of state police power there must be a clear manifestation by Congress of such an intent (pp. 13-14, *supra*). It is not the rule that a Congressional intent not to preclude consistent state legislation must be expressly set forth in a federal statute. On the contrary, the "clear manifestation" rule implies that the absence in a federal statute of any reference to state legislation is, if anything, significant of a Congressional intent *not* to exclude consistent state legislation upon the same subject.

Appellants cite *First Iowa Hydro-Electric Cooperative* v. *Federal Power Commission*, 327 U. S. ——, 90 Law Ed. 855, 66 Sup. Ct. 906, as holding that unless federal legislation contains a saving clause, state legislation is precluded. That case does not support appellants' contention. It should be noted (p. 22, *infra*), that the subject of the federal legislation in that case, the Federal Power Act, was the development of water power projects in navigable waters of the United States, a subject peculiarly national in its nature. But, more specifically, the holding in that case was not that the absence of a saving clause precludes state legislation. The holding was merely that the limited provisions of the saving clause in the Federal Power Act, indicated that Con-

gress did not intend to preserve to the states matters not included within the saving clause. Thus, the *First Iowa* case is wholly consistent with our contention that the absence of a saving clause in the National Act did not affect the power of New York to enact legislation consistent with the National Act.

In *Polish National Alliance* v. *National Labor Relations Board*, 322 U. S. 643, referred to by the Solicitor General (Brief, p. 66) and the appellant *Allegheny* (Brief, p. 16), the question concerned only the jurisdiction of the National Board over a fraternal benevolent association, which that Board had found to be "engaged in commerce within the meaning of the [National] Act." No question was presented as to whether the National Act precluded consistent state legislation. This Court held only that the National Board had properly assumed jurisdiction.

4. Congress has acquiesced in judicial and administrative construction that consistent state Acts lawfully stand together with the National Act.

Over eight years have elapsed since the Supreme Court of Wisconsin rendered its decision in *Wisconsin Employment Relations Board* v. *Rueping Leather Co.*, 228 Wisc. 473, 279 N. W. 673 (May 17, 1938). Over seven years have elapsed since the New York Court of Appeals rendered its decision in *Davega-City Radio* v. *New York State Labor Relations Board*, 281 N. Y. 13 (July 11, 1939). In each of those cases it was held that the National Act did not preclude consistent state legislation.

During this long period of time Congress has not taken any action to override those decisions. The fact that Congress has not amended the National Act negatives any inference that those decisions were inconsistent with the Congressional intent.

Congress, by failure to act, has similarly acquiesced in the practical construction placed upon the National Act and

the New York Act by the respective Boards hereinafter discussed (Point III, *infra*). Suffice it here to say that for over nine years the two Boards have construed the National Act as affording room for operation of the New York Act even in cases which affect commerce.

B

The National Act does not relate to an exclusively national field.

Labor controversies occurring in places of business or industry within the state are, in their nature, matters of local concern and even when they affect commerce constitute a proper subject for state police power legislation consistent with the National Act.

We have pointed out that the National Act does not manifest any intent, let alone a clear intent, to pre-empt.

The appellants further contend that the National Act covers a field which is national in "scope," and that this excludes the possibility of state legislation in the same field.

The Solicitor General, however, takes a position different from that of the appellants. The Solicitor General contends, in effect, that the National Act pre-empts the field, except that "where the National Board does not exercise its jurisdiction, the state may act" (Brief, p. 77).

There is no merit in appellants' argument that since the National Act is national in "scope," the subject thereof becomes one of exclusive federal concern. Practically all federal legislation is national in "scope," but it does not at all follow that the *subject* of such legislation lies only in the federal domain.

To construe as exclusively pre-emptive all federal statutes enacted pursuant to the "commerce" clause would in

effect abrogate the constitutional limitations upon federal powers, nullify the reservation of state powers and obliterate the fundamental distinction between national and local concerns—a distinction which "is vital to the maintenance of our federal system" (*National Labor Relations Board* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1, 30).

A federal statute may deal with a subject which is of concern to both the federal government and to the states: to the federal government because of the relationship of the subject to the flow of interstate commerce, and to the states because of the relationship of the subject to local health, safety and welfare. *But the fact that the federal power is paramount does not make it exclusive.*

That, we submit, is the statutory situation here.

The Solicitor General's argument that the National Act is an exclusive pre-emption but that it is such only as to those types of cases which the National Board sees fit to handle, is inherently inconsistent The National Act either does or does not pre-empt the field. It cannot be both exclusive and non-exclusive. Nor can it be partly exclusive and partly non-exclusive. Whether it is, or is not, an exclusive pre-emption i dependent upon the intention of Congress and not that of the National Board. The admission by the Solicitor General that there are many types of labor controversies affecting commerce which the New York Board lawfully has handled, necessarily refutes the argument that the National Act exclusively pre-empts the field. Indeed, the nine-year course of conduct upon the part of the National Board is of necessity based on the assumption that the National Board's jurisdiction, though paramount, is not exclusive (Point III, *infra*).

The Solicitor General further contends that "occupancy of a field" by a federal statute "presumptively" establishes an intention that the subject regulated is to be gov-

erned exclusively by that statute. This theory of "presumptive" preemption finds no support in judicial authority and has no merit whatever. Indeed, the only applicable presumption is directly to the contrary. It is well settled that a presumption of constitutionality exists in favor of state statutes (*Alabama State Federation of Labor* v. *McAdory*, 325 U. S. 450, 465; *Dickson* v. *Uhlmann Grain Co.*, 288 U. S. 188, 200; *Davis* v. *Department of Labor*, 317 U. S. 249).

Moreover, both the appellants and the Solicitor General misconceive the real point of the "field" approach. Such an approach, if applicable at all, relates, not to the "scope" of the statute, but to the *nature* of the field in which it operates, or, at most, to the *nature* of the subject matter dealt with in the statute (*Cooley* v. *Port Wardens*, 12 How. 299, 319; 13 L. Ed. 996, 1005; *Gilmdn* v. *City of Philadelphia*, 70 U. S. 713; 18 L. Ed. 96, 99; *Mobile County* v. *Kimball*, 102 U. S. 691, 26 L. Ed. 238, 239-241; *Parker* v. *Brown*, 317 U. S. 341, 362-3).

The significance of the *nature* of the field is clearly shown in *Allen-Bradley Local* v. *Wisconsin Employment Relations Board*, 315 U. S. 740, in which the constitutionality of the Wisconsin Employment Peace Act was involved, and in which this Court distinguished *Hines* v. *Davidowitz*, 312 U. S. 52. The *Hines* case concerned the constitutionality of a state system of registration of aliens. This Court pointed out (315 U. S. at 749) that in the *Hines* case it had been

> "• • • dealing with a problem which had an impact on the general field of foreign relations. • • • In that field any 'concurrent state power that may exist is restricted to the narrowest of limits.' Therefore we were more ready to conclude that a federal act in a field that touched international relations superseded state regulation than we were in those cases where a state was exercising its historic powers over such traditionally local matters as pub-

> lic safety and order and the use of streets and highways. *Maurer* v. *Hamilton, supra,* and cases cited.]"

The opinion continued:

> "Here we are dealing with the latter type of problem. We will not lightly infer that Congress by the mere passage of a federal Act has impaired the traditional sovereignty of the several States in that regard."

The patent fact is that none of the classes of judicial decisions upon which the appellants and the Solicitor General rely, namely, decisions relating to international relations, or to development and use of navigable waters, or to the regulation or operation of instrumentalities of interstate transportation, have any application to the cases at bar. Those decisions concern "fields" which obviously are, and consistently have been held to be, inherently federal in nature.

The case of *First Iowa Hydro-Electric Cooperative* v. *Federal Power Commission,* 327 U. S. ——, 90 L. Ed. 855, 66 Sup. Ct. 906, dealt with an application for a license relating to the use of navigable waters of the United States, a subject so essentially federal in nature that it is considered to be lifted "out of local controls and into the domain of federal control" (90 L. Ed. at 865). The same principle applies to *Hines* v. *Davidowitz,* 312 U. S. 52 (discussed in the *Allen-Bradley* case, p. 21, *supra*). There the federal legislation dealt with international relations—another field essentially national in its nature.

The same rationale governs the carrier cases cited by the appellants and the solicitor General. [5]

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5. *Gilvary* v. *Cuyahoga Valley R. R. Co.,* 292 U. S. 57, 60; *Napier* v. *Atlantic Coast Line R. R. Co.,* 272 U. S. 605; *Oregon Washington R. & Nav. Co.* v. *Washington,* 270 U. S. 87; *Erie R. Co.* v. *New York,* 233 U. S. 671; *Northern Pacific R. Co.* v. *Washington,* 222 U. S. 370; *Southern R. Co.* v. *Reid,* 222 U. S. 424; *Missouri Pacific R. Co.* v. *Porter,* 273 U. S. 341; *Second Employers' Liability Cases,* 223 U. S. 1; *Charleston etc. R. Co.* v. *Varnville,* 237 U. S. 597; *Gulf etc. R. Co.* v. *Hefley,* 158 U. S. 98; *N. Y. Central etc. R. R. Co.* v. *Board of Chosen Freeholders, etc.,* 227 U. S. 248.

The federal statutes there were applicable to interstate carriers or carriers operating along arteries of commerce, and thus bore directly upon the transportation of persons and goods across state lines—again a subject peculiarly of national concern. Indeed, decisions involving railroad legislation are particularly inapplicable here, for the National Act expressly excludes from its coverage, employers "subject to the Railway Labor Act" (National Act, sec. 2, sub. 2).

Moreover, the carrier cases are in no way analogous since they involved state statutes which generally or specifically conflicted with the federal legislation (See discussion in *Davega-City Radio* v. *N. Y. S. L. R. B.*, 281 N. Y. 13, 23).

The case of *Charleston and Car. Ry. Co.* v. *Varnville*, 237 U. S. 597, stressed in the opposing briefs for the proposition that "• • • coincidence is as ineffective as opposition • • •" (Allegheny, p. 36; Bethlehem, p. 31; Solicitor General, pp. 39, 46-7), was expressly distinguished by this Court in *Chicago & N. W. R. Co.* v. *Whitnack Produce Co.*, 258 U. S. 371. The *Chicago* decision pointed out (258 U. S. at 373) that the *Charleston* case had involved conflict between a federal statute and a state law which was "• • • not contrived in aid of the policy of Congress, but to enforce a state policy differently conceived."

The grounds of distinction between the situation at bar and that presented in the *Charleston* case are even stronger, first, because the situation at bar involves not railroad legislation but labor relations acts, second, because the New York Act is substantially identical with the National Act in policy, purpose and content, and third, because the application of the New York Act to the labor controversies in appellants' New York plants has placed no burden on commerce but on the contrary removed a burden from commerce (Point II, *infra*).

The case of *Cloverleaf Butter Co.* v. *Patterson*, 315 U. S. 148, cited by appellants and the Solicitor General, is not in point. The opinion of this Court clearly demonstrates that the basis of the decision was not exclusive pre-emption of a field, but conflict between the federal and state statutes. The federal statute expressly provided that renovated butter imported into a state shall be subject to the laws of the state as though produced therein. The Court said that "this indicates a congressional purpose not to hinder the free exercise of state power *except as it may be inconsistent with federal legislation*" (italics added, 315 U. S. at 161). After discussing the statutes, the Court concluded (315 U. S. at 167): "Coming finally to the query whether the state's claim interferes or conflicts with the purpose or provisions of the federal legislation, we determine that it does." Manifestly, therefore, the *Cloverleaf* case does not support the pre-emption argument urged by appellants and the Solicitor General. The decision in that case, we submit, should be confined to its particular facts involving, as it did, a situation in which the federal and state statutes came into actual conflict with each other.

The essential point here is that the field of labor relations, so far from being exclusively national in nature, is, and traditionally has been, local in its character.

The purpose of the National Act is to safeguard commerce against the industrial strife which arises from the refusal of employers to recognize the rights of employees to self-organization and to bargaining through representatives of their own choosing (*N. L. R. B.* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1, 42). But the industrial strife arising from the refusal of employers to recognize the rights of their employees is none the less a matter of substantial local concern.

Although industrial strife within the state may affect interstate commerce, it invariably has a direct and imme-

diate impact upon the local community. A strike or lockout in, or a picket line in front of, a place of business or industry within the state obviously concerns the state as much as the federal government. Indeed, the impact and effect of such a labor controversy within the state would ordinarily be a greater burden to the state than to the federal government. In a situation of that kind it would be but natural and reasonable to invoke an applicable police power statute, for jurisdiction over what is naturally a police power subject is inherent in the local sovereignty of the several states (*U. S.* v. *Butler*, 297 U. S. 1; *Schechter Poultry Corp.* v. *U. S.*, 295 U. S. 495, 549, 550, 554; *Carter* v. *Carter Coal Co.*, 298 U. S. 238, 308; *Gibbons* v. *Ogden*, 9 Wheat. 1; *Wilson* v. *Black Bird Creek Marsh Co.*, 2 Pet. 245; *Cooley* v. *Board of Port Wardens*, 12 How. 299).

This is not to say that the concern of the states is exclusive. We do not assert, as was argued in *N. L. R. B.* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1, that the nature of the field precludes action by the Federal Government. Our position simply is that the existence of the federal interest, although paramount, does not preclude New York from also having an interest; in other words, that the existence of the National Act does not preclude New York from legislating consistently therewith.

The nature and extent of local concern with problems arising out of the employment relationship is attested by the fact that ever since the foundation of the Republic, as well as prior thereto, the states have legislated in that field. Generally speaking, that field, except in the maritime and transportation industries, has always been under the control of the states. [6]

The New York Labor Law, most of which was enacted many years ago, deals, among other things, with the em-

6. See e. g. Dodd "From Maximum to Minimum Wages: Six Centuries of Regulation of Employment Contracts," Columbia Law Review, July, 1943, Vol. XLIII, No. 5, p. 643, commencing at heading "Labor Legislation in Colonial America" at p. 660, *et. seq.*

ployment of children and females (Article 4); hours of labor (Article 5); payment of wages (Article 6); general provisions for protection of health and safety of employees (Article 7); public work (Article 8); factories (Article 11); bakeries and manufacture of food products (Article 12); industrial homework (Article 13); mercantile and other establishments (Article 14); Unemployment Insurance (Article 18); minimum wage standards for women and minors (Article 19); Labor Relations Act (Article 20) and Mediation of Labor Disputes (Article 21). Still other branches of labor relations covered by the New York statutes are the Arbitration Law (N. Y. Civil Practice Act, Article 84), the Workmen's Compensation Law, the Employers' Liability Law and Section 876a of the New York Civil Practice Act, governing the issuance of injunctions in labor disputes.

Article I, Section 17 of the New York State Constitution adopted in 1938 provides: "Employees shall have the right to organize and to bargain collectively through representatives of their own choosing." This public policy is expressed in a host of statutes (Civil Rights Law, § 17; N. Y. State War Emergency Act, Laws 1942, Ch. 544, Art. VI, § 69; Gen. Bus. Law, §§ 84, 340 (2), (3); Penal Law, §§ 531, 582; Public Housing Law, § 152; Judiciary Law, § 753a).

The New York Act has been in existence for over nine years and has made a substantial contribution to the cause of reducing industrial strife and unrest (Point III, *infra*).

The long record of state concern with problems arising out of the employer-employee relationship, traditionally considered a proper subject for state legislation even where it might affect commerce, makes it readily apparent why Congress at the time of passage of the National Act "was concerned first with the question whether it had any power at all in the field" (*Wisconsin Employment Relations*

Board v. *Rueping Leather Co.*, 228 Wisc. 473; 279 N. W. 673, 679-80). Indeed, the constitutionality of the National Act remained in serious doubt for a period of approximately two years until the decision of this Court in *N. L. R. B.* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1.

Manifestly, the National Act does not divest the states of the jurisdiction which they have always exercised in the field of labor legislation. *The field is clearly local in its nature although it also may affect interstate commerce.*

The labor controversies in the cases at bar arose in manufacturing plants located within the State of New York —plants which are permanent in character, and in which raw materials brought from other states come to rest and are changed substantially in character, use and value. The controversies arose between the appellants, corporations licensed to do business in New York, and foremen who work in the appellants' New York plants.

Manufacturing is, in its nature, a local activity. It is not itself commerce. It is a step in preparation for commerce. Hence, in a particular case, it may come within the National Act because it "affects commerce" in the sense in which that term is used in the National Act (*N. L. R. B.* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1). But even where that is true, it remains in its *nature*, as contrasted with its effect, a local activity.

This Court repeatedly has confirmed that manufacturing is local in character and subject to local legislation. In *Carter* v. *Carter Coal Co.*, 298 U. S. 238, it was said (pp. 303-304, 308):

> "The employment of men, the fixing of their wages, hours of labor and working conditions, the bargaining in respect of these things—whether carried on separately or collectively—each and all constitute intercourse for the purposes of production, not of trade. *The latter is a thing apart from the relation*

of employer and employee, which in all producing occupations is purely local in character

* * * * * * *

"*The relation of employer and employee is a local relation.* At common law, it is one of the domestic relations. The wages are paid for the doing of local work. Working conditions are obviously local conditions. The employees are not engaged in or about commerce, but exclusively in producing a commodity." (Italics ours.)

In *Utah Power and Light Co.* v. *Pfost*, 286 U. S. 165, 181, it was said that "Commerce succeeds to manufacture, and is not a part of it." In *Schechter Poultry Corp.* v. *U. S.*, 295 U. S. 495, 547, this Court quoted with approval its earlier decision in *Industrial Asso.* v. *U. S.*, 268 U. S. 64, 82, to the effect that "manufacturing," like certain other industrial or agricultural activities, is "essentially local." In *Oliver Iron Mining Co.* v. *Lord*, 262 U. S. 172, 178, this Court compared mining with manufacturing and said that "mining is not interstate commerce, but *like manufacturing is a local business subject to local regulation and taxation.*" (Italics ours.)

In *Arkadelphia Milling Co.* v. *St. Louis S. W. R. Co.*, 249 U. S. 134, this Court declared (p. 151):

"Upon the facts as stated, it is our opinion that the district court erred in treating the movement of the rough lumber from the woods to the milling point as interstate commerce. It is not merely that there was no continuous movement from the forest to the points without the state, but that when the rough material left the woods it was not intended that it should be transported out of the state, or elsewhere beyond the mill, until it had been subjected to a *manufacturing process that materially changed its character, utility, and value. The raw material came to rest at the mill,* and after the product was manufactured it remained stored there for an indefinite period,—manufacture and storage occupying five months on the average, —for the purpose of finding a market. Where it

would eventually be sold no one knew. And the fact that previous experience indicated that 95 per cent of it must be marketed outside of the state, so that this entered into the purpose of the parties when shipping the rough material to the mill, did not alter the character of the latter movement. The question is too well settled by previous decisions to require discussion." (Italics ours.)

The foregoing decisions were cited to this Court in *N. L. R. B.* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1, in support of the company's contention that manufacturing is exclusively local in nature and that therefore labor controversies arising therein could not affect commerce so as to authorize the exercise of federal power. The Court upheld the constitutionality of the National Act as applied to the company.

As we read the opinion, however, that was done *without disturbing* the principles previously established in the *Carter, Schechter, Oliver, Utah and Arkadelphia* cases; namely, that trade is a thing apart from "the relation of employer and employee, which in all producing occupations is purely local in character" and that manufacturing is a "local" activity subject to local legislation. The decision of this Court in the *Jones & Laughlin* case went no farther than to hold, in substance, that even though manufacturing be local in character, a labor dispute arising in the course of manufacturing may, and in that case did, substantially affect commerce, and therefore came within the reach of the National Act.

We, of course, do not contend that the above-cited cases affect the power of the Federal Government to act in labor controversies affecting interstate commerce. The *Jones & Laughlin* case settled the constitutionality of the National Act and thus confirmed the federal power to act in such controversies.

In the *Jones & Laughlin* case, however, the question presented was the validity of the National Act standing

alone. The New York Act did not become law until July 1, 1937, over two months after the date of the decision in the *Jones & Laughlin* case.

In the cases at bar, the question is whether the New York Act validly stands together with the National Act.

We submit that the principles established in the *Carter, Schechter, Oliver, Utah* and *Arkadelphia Milling* cases give complete support to, and that the *Jones & Laughlin* case is wholly compatible with, our contention that the controversies concerning representation of foremen engaged in manufacturing activities in appellant's New York plants are local in nature, and therefore amenable to the New York Act, even though they also are amenable to the paramount National Act. The particular situation here presented, involving employer-employee relations, which traditionally have been considered a subject of local concern, and manufacturing, which also has long been treated as a matter of local concern, abundantly supports our contention that New York may lawfully exercise jurisdiction over the foremen representation controversies in appellants' New York manufacturing plants, until such time as the National Board assumes or asserts jurisdiction over those controversies because of their effect upon interstate commerce.

At the very least, the subject dealt with in the National Act is of local, as well as national, concern and hence an appropriate subject for state police power legislation consistent with the National Act. The situation is analogous to that presented in *Parker* v. *Brown*, 317 U. S. 341, in which the Court said (p. 367) that the adoption of legislative measures to prevent the demoralization of industry (in that instance, an agricultural industry) was

> "* * * a matter of state as well as national concern and, in the absence of inconsistent Congressional

action, is a problem whose solution is peculiarly within the province of the state."

The opposing briefs stress the statement of this Court in *National Labor Relations Board* v. *Hearst Publications*, 322 U. S. 111, 123, that the National Act is "federal legislation, administered by a national agency, intended to solve a national problem on a national scale."

That statement, however, should be read in the light of the issue that was before the Court, and interpreted accordingly. The *Hearst* case did not involve any state statute or any issue of pre-emption.

The issue presented in the *Hearst* case was as to the propriety of a finding by the National Board, that certain newsboys were "employees" within the meaning of the National Act. The publishers there contended that the issue should have been resolved under the common law of California, where the newsboys worked; that under California common law the newsboys were independent contractors; and that therefore they were not employees within the meaning of the National Act (322 U. S. at 120).

This Court discussed the varying lines of demarcation used by the courts of the different states in distinguishing between employees and independent contractors. The opinion stated that if the publishers' contention were accepted, the meaning of the term "employee" as used in the National Act would become dependent on either "local state law" or "a sort of pervading general essence distilled from state law," and that under either alternative the meaning of the term "employee" in the National Act would vary with accidents of geographical location (322 U. S. at 122). The Court held that such a result could not be permitted.

It was in *that* connection that this Court stated the National Act "is federal legislation administered by a

national agency, intended to solve a national problem on a national scale" (322 U. S. 123).

Considered in connection with the issue actually before this Court in the *Hearst* case, it is clear that the above-quoted language was in no sense a holding that the National Act is an exclusive pre-emption for no such question was involved. The holding was only that the term "employee" as used in the National Act, is not limited by state law.

Clearly, then, the *Hearst* case does not support the appellants or the Solicitor General. On the contrary, that decision is entirely consistent with our position on these appeals. A holding that the meaning of a term used in a federal statute may not be limited by state law, is perfectly consistent with the proposition that the New York Act may co-exist with the National Act.

There is but one decision of this Court which discusses the National Act in relation to the New York Act namely, *Consolidated Edison Co.* v. *N. L. R. B.*, 305 U. S. 197. Although the factual situation there presented did not involve actual application of the New York Act, that case clearly supports our position in principle.

The company, apart from its argument that it was engaged solely in intra-state business, contended that even if its activities did affect interstate commerce, the enactment of the New York Act made application of the National Act unnecessary. This Court, rejecting that contention, said (305 U. S. at p. 224):

> "In the instant case, not only was this proceeding instituted before the New York Labor Relations Act became effective, but so far as appears, no proceedings have been taken under it in relation to the unfair labor practices here alleged. For the present purpose, it is sufficient to say that there has been no exertion of state authority which can be taken to remove the need for the exertion of federal authority to protect interstate and foreign commerce."

The quoted matter is implicit with a holding that the National Act does not exclusively occupy the field, for it is based upon the premise that the National Act and the New York Act may co-exist and stand together.

The holding is entirely consistent with our position that although the National Act is paramount, the New York Act is also valid and applicable to labor controversies occurring in places of business or industry within the state, even though such controversies may affect interstate commerce.

To paraphrase the above quotation from the *Consolidated Edison* case, it is sufficient that in the instant cases there has been no exertion of national authority which can be taken to remove the need for the exertion of state authority in order to protect public health, safety and welfare within New York. This clearly follows from the fact (Point III, *infra*) that the National Board did not assume or assert jurisdiction or object to the New York Board entertaining jurisdiction over the labor controversies concerning the representation of foremen in the appellants' New York plants.

The decision of this Court in *Allen-Bradley Local etc.* v. *Wisconsin Employment Relations Board*, 315 U. S. 740, although not directly in point, indicates clearly that the National Act does not exclusively occupy the field. While the portion of the Wisconsin Act there under consideration dealt with unfair labor practices committed by employees, rather than employers, the decision nevertheless is significant upon the question of pre-emption, first, because this Court there reaffirmed the principle that "an intention of Congress to exclude states from exercising their police power must be clearly manifested" (p. 749), second, because the Court did not state or even suggest that the National Act precluded state legislation consistent therewith, although that contention was made, and third, because the

Court held that the National Act and the Wisconsin Act as applied could "consistently stand together." [7]

Apart from the decisions which give rise to these appeals, the only New York Court of Appeals decision, involving the question of pre-emption, is *Davega-City Radio, Inc.* v. *New York State Labor Relations Board*, 281 N. Y. 13.

There the company sought to vacate an order of the New York Board. The company contended that its activities affected interstate commerce; that the National Act is an exclusive pre-emption; and that the New York Board was therefore without jurisdiction. The Court assumed, but did not determine, that the company's activities sufficiently affected commerce so as to make it amenable to the jurisdiction of the National Board (281 N. Y. at 20).

The Court rejected the company's contention that the National Act is an exclusive pre-emption, saying (281 N. Y. at 22):

> "From a study of authorities it does not appear that the National Labor Relations Act *ipso facto* precludes the State legislation applicable to the same situations." [8]

The opinion, after discussing various judicial authorities, continued (281 N. Y. at 24):

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7. The Wisconsin Supreme Court in *International Union, etc.* v. *Wisconsin Employment Relations Bd.*, 245 Wis. 417; 14 N. W. (2) 872, said that the decision of this Court in the *Allen-Bradley* case:

> "* * * determines that the State agency may take jurisdiction of proceedings to enforce the State act unless there is conflict between the two acts. The thing that determines jurisdiction of the State Board is conflict between the two acts, not the mere fact that the Congress has passed a Federal act affecting interstate commerce."

8. The case most stressed in the opinion, (281 N. Y. 13, 21, 22) as militating against the pre-emption theory is *Dickson* v. *Uhlmann Grain Co.*, 288 U. S. 188. In the *Dickson* case this Court held that federal regulation of trading in grain futures, under the Federal Grain Futures Act, did not imply a prohibition of more rigorous state legislation, the Missouri bucket shop law, and that therefore the federal statute did not supersede the state statute.

> "We reach the conclusion, therefore, that the State Labor Relations Board may enforce the State act at least until such time as it is ousted by the exercise by the National Labor Relations Board of its jurisdiction under the National Act." [9]

The Court further stated that there was no need to consider "at what point the State Board would be displaced," for the record showed that the National Board had advised the New York Board that the National Board would not assume jurisdiction. The Court concluded that (281 N. Y. at 24):

> "It is sufficient that in the present case the National Board has not acted."

The same situation obtains in the cases at bar (Allegheny R. pp. 45-6; Bethlehem R. pp. 56-7). The National Board did not assume or assert jurisdiction over the controversies concerning the representation of the foremen in the appellants' New York plants. The National Board at no time acted to displace the New York Board and did not even suggest that it had any objection to the New York Board entertaining jurisdiction (Point III, *infra*). The New York Board therefore properly exercised jurisdiction.

Moreover, as we shall show in Point III, *infra*, the non-pre-emptive character of the National Act is further reenforced by the administrative construction and procedure to which both the National and New York Boards have adhered for over nine years.

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9. The Wisconsin and Pennsylvania Courts also have held that the National Act does not bar state legislation consistent therewith (*Wisconsin Employment Relations Bd.* v. *Rueping*, 228 Wisc. 473; 279 N. W. 673, 679-80, cited in the *Davega* opinion, 281 N. Y. at page 25; *Christoffel* v. *Wisconsin Employment Relations Bd.*, 243 Wisc. 332, cert. den., 320 U. S. 776; *International Union, etc.* v. *Wisconsin Employment Relations Bd.*, 245 Wisc. 417; 14 N. W. (2) 872; *Allen-Bradley Local, etc.* v. *Wisconsin Employment Relations Bd.*, 237 Wisc. 146, aff'd 315 U. S. 749; *Wisconsin Bd.* v. *Hall Garage Corp.*, Wisc. Circuit Court, decided Sept. 7, 1946, 18 Labor Relations Reference Manual 2419; *In re York Telephone & Telegraph Company's Employees*, Pennsylvania Court of Common Pleas, decided Sept. 21, 1945, 17 Labor Relations Reporter 175; *Matter of Equitable Gas Co.*, 51 D & C (Pa.) 659).

Finally, even if it were assumed, that the National Act might be susceptible of a possible *inference* of prohibition against the exercise of state police power upon the same subject, this still would not affect the validity of the New York Act. A mere inferable intent to prohibit state legislation is ineffective *unless such legislation be directly inconsistent with the National Act.* If it is reasonably possible to reconcile a state act with the National Act, the two acts co-exist and stand together (*Cloverleaf Butter Co.* v. *Patterson*, 315 U. S. 148, 156; *Kelly* v. *Washington*, 302 U. S. 1, 10-14; *Allen-Bradley Local* v. *Wisconsin Employment Relations Board*, 315 U. S. 740, 751; *Gilvary* v. *Cuyahoga Valley R. Co.*, 292 U. S. 57, 61; *Savage* v. *Jones*, 225 U. S. 501, 533; *Alabama State Fed. of Labor* v. *McAdory*, 325 U. S. 450, 467).

In the *Cloverleaf* case (*supra*) this Court said (315 U. S. at 156):

> "When the prohibition of state action is not specific but inferable from the scope and purpose of the federal legislation, it must be clear that the federal provisions are inconsistent with those of the state to justify the thwarting of state regulation."

And in *Kelly* v. *Washington* (*supra*) it was said (302 U. S. at 10):

> "The principle is thoroughly established that the exercise by the State of its police power, which would be valid if not superseded by Federal action, is superseded only where the repugnance or conflict is so 'direct and positive' that the two acts 'cannot be reconciled or consistently stand together.'"

In this Point, we have shown that the National Act does not manifest any intention to preclude consistent state legislation in the same field; that the field in which the National Act operates is not inherently national in nature; that, on the contrary, the field of labor relations is, and

traditionally has been, local in character, and therefore constitutes a proper subject for state legislation consistent with the National Act.

We shall now show (Point II *infra*), that the New York Act does not conflict with the National Act, either in terms, or as here applied.

POINT II

The New York Act does not conflict with the National Act, either in terms or as here applied.

In Point I we have demonstrated that the contention of "exclusive preemption" has no merit since the National Act neither expressly nor impliedly prohibits consistent state legislation upon the same subject.

Equally untenable is the contention that the New York Act conflicts with the National Act in terms or as here applied.

Far from being in conflict, the two Acts are substantially identical. The New York Act, therefore, is legally applicable to any labor controversy occurring within New York, even one affecting commerce, so long as the National Board does not assume or assert its paramount jurisdiction over the same controversy.

A

The New York Act is "the State's equivalent" of the National Act.

The New York Act is the State's counterpart of the National Act. The two Acts harmonize and consist with each other in all substantial respects.

Each Act guarantees the right of employees to "self-organization, to form, join, or assist labor organizations, to

bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection." (National Act, Section 7; New York Act, Section 703). In 1938 this guarantee was embodied in Article I, Section 17 of the New York State Constitution (p. 26, *supra*).

In *Consolidated Edison Company* v. *National Labor Relations Board*, 305 U. S. 197, this Court, referring to the New York Act, said (p. 223):

> "The state act, with added details, follows closely the national act."

The *Consolidated Edison* case was followed by the New York Court of Appeals in *Davega-City Radio, Inc.* v. *New York State Labor Relations Board*, 281 N. Y. 13. The New York Court rejected the "conflict" contention, saying (p. 22):

> "The two statutes are not only alike in their provisions but are almost identical in their language. It has been observed that the New York act is the State's equivalent of the National Act (*Consolidated Edison Co.* v. *National Labor Relations Board, supra*, at pp. 222, 223). If the employer were to obey the mandate of the State rather than that of the National act the result would be precisely the same."

The Court further stated (281 N. Y. at 22):

> "Similarly the New York State Labor Relations Act is in no way inconsistent with the provisions of the National Labor Relations Act, and the New York law does not legalize any transaction which the National act has denounced."

The determination that both Acts "are not only alike in their provisions but are almost identical in their language" was reiterated and approved by the New York

Court of Appeals in *New York State Labor Relations Board* v. *Holland Laundry, Inc.*, 294 N. Y. 480, 492-3.

A presumption of constitutionality exists in favor of a state statute, and the statute cannot be condemned as in conflict with federal legislation unless conflict is clearly shown (*Alabama State Federation of Labor* v. *McAdory*, 325 U. S. 450; *Dickson* v. *Uhlmann Grain Co.*, 288 U. S. 188; *Davis* v. *Dept. of Labor of Washington*, 317 U. S. 249). The conflict, if any, must be "so direct and positive that the two acts cannot be reconciled or consistently stand together." (*Kelly* v. *Washington*, 302 U. S. 1, 10; *Savage* v. *Jones*, 225 U. S. 501, 533; *Allen-Bradley Local, etc.* v. *Wisconsin Employment Relations Board*, 315 U. S. 740, 751).

The New York Act and the National Act here "consistently stand together," for they are substantially the same. Indeed, the New York Act is consistent with the National Act in the *most direct and satisfactory sense*, since it is practically identical with the the National Act.

B

No real question of conflict is involved.

It is contended in the opposing briefs that the National Act and the New York Act, so far as representation proceedings are concerned, conflict (1) because the two acts allegedly provide different standards or criteria for the determination of appropriate bargaining units, (2) because allegedly each board serves the interest of the sovereignty which created it, and (3) because the discretion vested in the respective boards permits possible conflict.

The contention has no merit.

1. Types of Appropriate Bargaining Units.

The appellants and the Solicitor General assert that the two Acts conflict in that they allegedly set up different

standards for determining appropriate units for purposes of collective bargaining. Both acts mention employer units, craft units and plant units as appropriate forms of unit (National Act, §9(b); New York Act, §705(2)). The New York Act, in Section 705(2), also mentions multiple employer units, whereas the National Act does not. In addition, the New York Act (sec. 705, sub. 2) contains a provision, not found in the National Act, that "where the majority of employees of a particular craft shall so decide the board shall designate such craft as a unit appropriate for the purpose of collective bargaining." Upon the basis of these alleged differences, it is contended that the two Acts conflict.

These alleged differences are not here involved. They are wholly immaterial (*Alabama State Federation of Labor* v. *McAdory*, 325 U. S. 450, 461).

Each of the cases at bar involves a *plant* unit, a type of unit specifically provided for in *both* the National Act (sec. 9, subd. b) and the New York Act (sec. 705, subd. 2).

Neither case involves a multiple employer unit, a craft unit, a single employee unit, or a multiple state unit. In each of the representation proceedings before the New York Board, the foremen's union petitioned for a plant unit. In neither of the representation proceedings did the appellants contend that a multiple employer unit, a craft unit, a single employee unit or a multiple state unit was appropriate. In the *Allegheny* case the New York Board found a *plant* unit. And no unit determination has yet been made by the New York Board in the representation proceeding involving appellant *Bethlehem*. That proceeding is still at the hearing stage pending compliance by *Bethlehem* with the subpoenas at bar.

Moreover, the alleged differences between Section 9(b) of the National Act and Section 705 (2) of the New York Act are differences merely in words, not in substance.

Under each Act, the appropriate unit is to be one which will "effectuate the policies" of the Act. Both Acts have a common purpose, namely, to minimize industrial strife, in the public interest.

The difference in wording between Section 9(h) of the National Act and Section 705 (2) of the New York Act creates no conflict. Although the National Board's decisions as to multiple employer units do not depend upon an express statutory provision, such as is contained in the New York Act, those decisions are in substantial accord with the decisions of the New York Board. There are many cases in which the National Board has found that type of appropriate bargaining unit (*Matter of Rayonier Inc., Grays Harbor Division*, 52 N. L. R. B. 1269; *Matter of George F. Carleton & Co., Inc.*, 54 N. L. R. B. 222; N. L. R. B. Ninth Annual Report, p. 33 [10]). Indeed, the National Board had found such units; and such units had been sustained by the Federal courts, before the New York Act was amended in 1942 so as to make specific mention of multiple employer units (*National Labor Relations Board* v. *Lund*, 103 F. (2d) 815, 819, decided May 10, 1939).

Again, while the National Act does not contain the proviso found in Section 705 (2) of the New York Act, namely, that where the majority of employees in a particular craft so decide, the Board shall designate the craft unit as appropriate, nonetheless the National Board frequently follows a similar procedure, i. e., direction of a preliminary election in which the craft group may vote as to whether they wish to bargain separately as a craft, or be merged with other groups. [11]

10. "Since a group of employers in certain circumstances may constitute a single 'employer' within the purview of the Act, some or all the employees of the group may be deemed an appropriate unit."

11. The National Board, in its Ninth Annual Report, said (p. 34):

"Where the considerations favoring a craft unit and those favoring a more comprehensive unit are of substantially equal weight, the Board generally directs a self-determination election in order to ascertain the desires of the employees with respect to the union by which they wish to be represented, and consequently the type of unit in which they prefer to bargain."

Clearly, therefore, the alleged differences between Section 9(b) of the National Act and Section 705 (2) of the New York Act, even if applicable to the cases at bar, do not create any conflict in the Acts themselves or in their application by the respective Boards.

2. Different Sovereignties.

The contention that the National Board and the New York Board serve the interest of different sovereignties, and that this will tend to create conflict, is plainly erroneous and contrary to constitutional principles protecting the states' historic police power.

That the National Board derives its authority from a federal statute, while the New York Board obtains its authority from a state statute, neither constitutes, nor leads to, conflict between the two Acts. It is true that the National Act is an exercise of the federal government's power to safeguard inter-state commerce from obstruction, whereas the New York Act is an exercise of the state's police power "for the protection of the public welfare, prosperity, health and peace" (N. Y. Act, Sec. 700). That the respective sovereignties draw on different sources for their respective powers, however, does not alter the fact that both Acts are aimed at the *same mischief* and have a *common purpose*. The National Act seeks to minimize industrial strife because it "has the effect of burdening or obstructing commerce"; the New York Act, because it is "inimical to the public safety and welfare and frequently endanger[s] the public health." But both statutes have a common objective.

That both statutes have a common purpose has been explicitly recognized by the New York Court of Appeals in *Davega-City Radio, Inc.* v. *New York State Labor Relations Board*, 281 N. Y. 13, and in *New York State Labor Relations Board* v. *Holland Laundry, Inc. et al.*, 294 N. Y. 480, 492-3, where it was said:

> "Opinions of the Federal court construing the National Labor Relations Act apply with equal force to the State Labor Relations Act, though they are of course not legally binding in that field."

Accordingly, the fact that the Boards serve different sovereignties neither constitutes, nor tends to cause, conflict.

3. Discretionary Powers.

Finally, it is contended that the discretion vested in the respective Boards to determine appropriate bargaining units may result in conflict between the National and the New York Acts. That contention is without merit.

Conflict can only result, if at all, from the *exercise* of discretion in application to a *particular labor controversy*, and then only where there is *actual conflict between two decisions* resulting from the exercise of such discretion.

The discretion exercised by the New York Board in the instant labor controversies, obviously raised no conflict between the two Boards. The National Board did not assume or assert jurisdiction over these labor controversies (Allegheny, Rec. pp. 45-6; Bethlehem, Rec. pp. 56-7).

Further the "conflict" argument is couched in terms of what "might" or "could" or "would" or "may" result from the exercise of the discretionary powers vested in the two Boards. It is predicated, not upon any present factual situation, but upon the mere future possibility of conflicting applications of the two Acts by the respective Boards.

Such conjectural or hypothetical applications should not be taken into consideration. [12]

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12. Concern lest the New York Board certify a "company union" in the guise of an independent union (Solicitor General's brief p. 53), is not only conjectural, but overlooks the explicit provision of the New York Act that such a union "shall not be listed on the ballots, certified or otherwise recognized as eligible to be the representative of employees under this article" (New York Act, Section 705, subdivision 6).

It is not even suggested by the appellants or the Solicitor General that the Foreman's Association of America, which the New York Board certified in the *Allegheny* case, is a company union. That very union was certified by the National Board in the *Packard* case.

The jurisdiction of this Court may not be invoked upon academic or speculative matters. The Court has emphasized that it deals with cases upon the basis of the actual facts presented, and not upon non-existent or assumed circumstances. As was said in *Alabama State Federation of Labor* v. *McAdory*, 325 U. S. 450, 461):

> "It has long been its [this Court's] considered practice not to decide abstract, hypothetical or contingent questions, * * * or to decide any constitutional question in advance of the necessity for its decision, * * * or to formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied, * * * or to decide any constitutional question except with reference to the particular facts to which it is to be applied." [13]

Moreover, there never has been any real conflict.

C

The *Maryland Drydock* decision, now moot, never gave rise to conflict.

Even apart from the academic or hypothetical nature of the "conflict" contention, there is clearly no legal basis for such a contention.

The alleged conflict between the New York Board's decision in the *Allegheny* case at bar, and the decision of the National Board in *Matter of Maryland Drydock Company*, 49 N. L. R. B. 733, even assuming that it ever existed, concededly *ended* when the National Board overruled its *Maryland Drydock* decision in *Matter of Packard Motor Car Co.* (61 N. L. R. B. 4; 64 N. L. R. B. 1212, enforced August 12, 1946, —— F. (2) ——, not yet reported, Circuit

13. See also: *Bandini Petroleum Co.* v. *Superior Ct.*, 284 U. S. 8, 76 L. Ed. 136, 145; *Associated Press* v. *National Labor Relations Board*, 301 U. S. 103, 81 L. Ed. 953, 960; *Hicklin* v. *Coney*, 290 U. S. 169, 78 L. Ed. 247, 250; *Gt. Atlantic & Pacific Tea Co.* v. *Grosjean*, 301 U. S. 412, 81 L. Ed. 1193, 1203; *U. S.* v. *Appalachian Electric Power Co.*, 311 U. S. 377, 85 L. Ed. 243; *Watson* v. *Buck*, 313 U. S. 387, 85 L. Ed. 1416.

Court of Appeals, 6th Circuit, 18 L. R. R. M. 2432; petition for certiorari filed October 30, 1946, 19 L. R. R. 12).

In the *Maryland Drydock* case, the National Board, Chairman Millis dissenting, had dismissed a petition for investigation of a controversy concerning the representation of foremen, holding that units of foremen were not appropriate for bargaining, except in particular industries where there had been a prior history of bargaining by foremen. The National Board's decision there overruled a long line of its prior decisions which had held units of supervisory employees to be appropriate.

In the *Packard* case the National Board expressly overruled the *Maryland Drydock* decision, and held a unit of foremen to be appropriate.

The National Board in the *Packard* case emphasized the same criteria and adopted the same rationale which the New York Board consistently has applied. The union involved in the *Packard* case is the same union as in the instances at bar, namely, the Foremen's Association of America. The unit found appropriate in the *Packard* case is the same type as that which the New York Board previously had found appropriate in the *Allegheny* case at bar. [14]

The National Board's Decision and Direction of Election in the *Packard* case was issued while the cases at bar

14. In the *Packard* case the National Board found (61 N. L. R. B. at 26):

"* * * all general foremen, foremen, assistant foremen, and special assignment men employed by the Company at its plants in Detroit, Michigan, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act."

In the *Allegheny* case the New York Board found (No. 76, R., pp. 37-8):

"The foremen, shift foremen, general foremen and general shift foremen (excluding the general manager, assistant general manager, production manager, manager, superintendents, shift superintendents, assistant superintendents and supervisors) employed by Allegheny Ludlum Steel Corporation at its Dunkirk, N. Y., plant, constitute a unit appropriate for the purposes of collective bargaining with the meaning of Section 705, subdivision 2, of the Act."

were pending undetermined before the Appellate Division of the New York Supreme Court. That decision was specifically called to the attention of the Appellate Division and, later, the New York Court of Appeals.

Since the New York appellate courts were required to consider appellants' assertion of "conflict" in the light of the situation as it actually existed *after* the *Packard* decision, it is clear that the matter reviewed by the New York appellate courts involved no conflict at all (*Graybar Elec. Co.* v. *New Amsterdam Casualty Co.*, 292 N. Y. 246, 250; *Hill Packing Co.* v. *City of N. Y.*, 295 N. Y. 527, 538.

The fact is, however, that there was no "conflict" *even before* the National Board overruled its *Maryland Drydock* decision.

The *Maryland Drydock* decision did *not* prohibit collective bargaining by foremen outside the framework of the National Act, but merely declined to make the National Board's election and certification machinery available to them. In *Matter of Soss Mfg. Co.*, 56 N. L. R. B. 348, [15] the National Board held that the discharge of a foreman for union activity constituted a violation of the National Act and that its prior decision in the *Maryland Drydock* case was *not* to be taken to mean that it was illegal for foremen to organize and bargain through representatives of their own choosing. The National Board, in the *Soss* case, said (p. 352):

> "Moreover, our opinion in that case [the *Maryland Drydock* case] did not illegalize collective bargaining outside the framework of the [National] Act for the supervisors' organizations."

It is therefore clear that even prior to the National Board's decision in the *Packard* case, the New York Board's certification in the *Allegheny* case—assuming it

15. Decided May 8, 1944, before the New York Board's decision in the *Allegheny* case (May 24, 1944).

was an order or direction, which it was not, [16]—did not direct or prohibit any action which was prohibited or directed by the National Act or by the National Board. *The action of the New York Board did not deprive the appellants of any right under the National Act.* Neither the National Act nor, for that matter, the *Maryland Drydock* decision, created any right in the appellants.

In the definitive or real sense of the term, therefore, there was no conflict between the *Maryland Drydock* case and the decision of the New York Board in the *Allegheny* case. [17]

It is argued by the Solicitor General (brief, p. 36) that the National Board's refusal to entertain foremen's petitions during the brief life of the *Maryland Drydock* decision was the enforcement of a policy that employers "not be required" to bargain with foremen. It is asserted that the National Board intended to differentiate between voluntary and "required" recognition or bargaining on the theory that voluntary recognition or bargaining is less likely to result in interference by supervisors with the rights of rank and file employees. In the *Soss* case (discussed at p. 46, *supra*) the National Board said (56 N. L. R. B. at 352) that the *Maryland Drydock* decision "did not illegalize collective bargaining outside the framework of the [National] Act, for the supervisors' organizations." Although the National Board was aware of the New York Board's consistent recognition of foremen, the National Board gave no indication that it intended to preclude "required" bargaining *under state statutes.* [18]

16. *N. L. R. B.* v. *Falk Corp.*, 308 U. S. 453, 459; *A. F. of L.* v. *National Labor Relations Board*, 308 U. S. 401; *National Labor Relations Board* v. *I. B. E. W.*, 308 U. S. 413; *Matter of Wallach's, Inc.* v. *Boland* (N. Y. S. L. R. B.), 253 App. Div. 371, aff'd 277 N. Y. 345; *Great Atlantic & Pacific Tea Co.*, v. *Roland* (N. Y. S. L. R. B.), 176 Misc. 258, aff'd 261 App. Div. 900).

17. Hearings in the *Bethlehem* case have not been concluded and no decision has been rendered by the New York Board in that case.

18. The basis advanced by the Solicitor General (Brief, p. 35) for the suggested differentiation between voluntary and required recognition or bargaining is difficult to comprehend. In situations in which the employer voluntarily deals with a supervisors' organization, there is at least as much likelihood of interference with the rights of rank and file employees.

The Solicitor General also contends (brief, p. 32) that the refusal of the National Board to entertain foremen's petitions was an "affirmative" assertion of jurisdiction, comparable to the dismissal of a petition seeking a particular type of bargaining unit which the National Board, after hearing, finds not to be appropriate. There is, however, a vital distinction between the example offered by the Solicitor General and the type of action taken by the National Board under the *Maryland Drydock* decision.

In the Solicitor General's example, the petition is dismissed *after* hearing. Moreover, dismissal of the petition follows only where the petitioning union does not desire to proceed except on the basis of the bargaining unit which it asserted to be appropriate. Where the petitioning union so desires, the National Board directs an election in whatever unit it finds to be appropriate, even though that unit may differ from the unit originally sought (*Matter of Vaughan Motor Co.*, 54 NLRB 1351, 1357).

Under the former *Maryland Drydock* decision, however, the National Board refused to entertain foremen's petitions or to hold hearings thereon, *regardless* of the type of bargaining unit sought. Thus, the position of the National Board under the *Maryland Drydock* decision, clearly was not an affirmative assertion of jurisdiction. It was rather a declination to act, that is, a refusal to entertain jurisdiction. [19] Even assuming, for purposes of discussion, that the National Board might, in its discretion, withhold the exercise of its power to compel collective bargaining, it does not follow that the National Board had authority to prohibit collective bargaining outside the framework of the National Act. To argue, as does the Solicitor General, that the National Board, by a mere declaration of policy, may bind even those who have not

19. In the *Packard* decision the National Board characterized the *Maryland Drydock* holding as "a policy of negation which contributes nothing to a constructive solution" (61 N. L. R. B. at 20); see also the dissenting opinion in *Matter of Maryland Drydock*, 49 N. L. R. B. at 749.

invoked its jurisdiction, is to transform what Congress set up as a quasi-judicial body (*Amalgamated Utility Workers* v. *Consolidated Edison Co.*, 309 U. S. 261, 267), into a quasi-legislative body. [20]

The National Board itself, however, has concluded that it is *without power* to refuse to entertain foremen's petitions or to refuse to place foremen in any bargaining unit whatsoever. The Solicitor General's brief states (p. 30n) that in the *Jones & Laughlin* decision, 66 N. L. R. B. 386, which followed the *Packard* decision, the National Board

> "concluded that in view of the statutory grant of 'full freedom' in the selection of representatives to all employees it [the National Board] was *powerless* to deny to supervisors, as to other employees, the right to be represented by any bona fide labor organization of their choice whether affiliated or unaffiliated." (Italics ours.)

In the *Jones & Laughlin* case, the majority of the National Board had stated [see 17 L. R. R. 972]:

> "The Board has already found that these foremen are 'employees' within the meaning of the Act. We think that this is largely dispositive of this case. The Act contains no specific language empowering the Board to disqualify a freely chosen, legitimate labor organization, not company-dominated, as the collective bargaining representative of persons already found to be 'employees' within the meaning of the Act.
>
> "It is argued, in effect, however, that the duty to define the appropriate unit conferred by Section 9 (b) carries with it a power to limit the em-

20. Cf. the dissenting opinion in *Matter of Maryland Drydock*, 49 N. L. R. B. at 743:

> "Manifestly to engraft upon the Act an amendment which denies to a substantial segment of employees as a class the protection vouchsafed therein to all 'employees' is not within the permissible bounds of administrative discretion. It is administrative legislation."

> ployees' choice of a bargaining representative. 'A reading of the section does not support this view. Section 9 (b) is concerned with the question of how employees are to be grouped and not with the question of who is to represent them. The Board is entrusted with the task of deciding whether the 'employer unit, craft unit, plant unit, or subdivision thereof,' is the appropriate unit calculated 'to insure to employees the full benefit of their right to self-organization and to collective bargaining, and otherwise to effectuate the policies of this Act.' This is language of classification and not of exclusion. It authorizes the Board to select between alternatives as to which type of unit will best 'effectuate the policies of the Act'; *it gives us no license to hold that some persons who are 'employees' belong in no unit whatsoever.* Once the Board determines that certain employees are properly grouped, it has discharged its function under this section. As the statute is now written, *we find no authority to step beyond this point* and, because of some concern as to what might be best for industry or even for employees, declare that certain employees may not express their uninhibited choice because the petitioner happens to be an affiliate of the labor organization which represents a company's rank and file employees." (Italics ours.) [21]

Clearly, therefore, the National Board not only has overruled the *Maryland Drydock* decision, but has expressly recognized that it had been *without power or authority* to enunciate any such policy. Under these circumstances, it cannot be successfully maintained that the New York Board's action was invalid.

Thus the alleged conflict with the National Board's policy is of no consequence, for the National Board has repudiated that policy as beyond its authority and as disruptive of interstate commerce as well.

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21. To the same effect, see *L. A. Young Spring & Wire Corp.*, 65 N. L. R. B. 298.

D

Th New York Act as applied placed no burden on interstate commerce.

The arguments of the appellants and the Solicitor General proceed upon the assumption that the New York Board's action in *the instant cases* imposed a burden on interstate commerce. That assumption is unfounded and, indeed, is completely refuted by the facts.

Appellants' contention that the action of the New York Board has burdened interstate commerce originally was based upon the alleged conflict between the *Maryland Drydock* decision and the action of the New York Board in the cases at bar. Wholly apart from the fact that the *Maryland Drydock* decision has now been repudiated by the National Board, it is clear that the New York Act, as applied, has not burdened interstate commerce.

During the interval between the *Maryland Drydock* decision and the *Packard* decision, there was a wave of recognition strikes by foremen in other states. The foremen in appellant's New York plants, had the use of the New York Act's machinery, and did not strike. [22]

In the *Packard* case, after referring to the fact that 642,389 man-days had been lost in strikes by foremen for recognition (61 N. L. R. B. at 13), the National Board concluded (61 N. L. R. B. at 21):

22. The New York Board's decision in the *Allegheny* case had pointed out that the "fundamental" rights of employees, including foremen, to organize and to seek bargaining were not created by the Labor Relations Acts but antedated them; that to withhold from foremen the statutory machinery for obtaining recognition would be to relegate them to the use of economic strength and would result in industrial strife (No. 76, R., p. 34).

See also discussion in *Matter of Journal News*, 7 N. Y. S. L. R. B. 295, 300-306 for a more complete statement of the New York Board's approach.

> "To continue to deny to such employees as a class the bargaining rights guaranteed by the Act would be to ignore the clear economic facts and invite further industrial strife—a state of affairs which the Nation can ill afford at this time and which the Act was designed to mitigate. We are now convinced that the national interest will be better protected if the organizational activities of foremen are conducted within, rather than without, the framework of the collective bargaining statute."

Thus, the fact is—and this is admitted by the Solicitor General (p. 30n)—the *Maryland Drydock* decision "led to frequent and serious strikes, disruptive of interstate commerce and war production * * *."

The return by the National Board to the policy consistently followed by the New York Board clearly demonstrates that no burden on interstate commerce resulted from the action of the New York Board in the cases at bar. Indeed, it shows that a burden upon interstate commerce was removed by the action of the New York Board.

We respectfully submit therefore that the New York Act does not conflict with the National Act either in terms or as here applied.

We shall next show (Point III, *infra*) that nine years of administrative construction and procedure, as well as practical considerations, support the New York Board's jurisdiction.

POINT III

The long-continued administrative construction and procedure of the National Board support the New York Board's concurrent jurisdiction.

It has been shown in Points I and II that the National Act is paramount but not exclusive, that the National Act and the New York Act lawfully stand together and that the New York Act does not conflict with the National Act in terms or as here applied.

A

Administrative construction reinforces the New York Board's jurisdiction.

Over nine years ago the National Board and the New York Board adopted, and have since followed, a practical construction of the two Acts—a construction based upon the existence of concurrent jurisdiction in the New York Board, and compatible with no other theory. This administrative construction of the two Acts is consonant with the subsequent decisions of this Court in *Consolidated Edison Co.* v. *National Labor Relations Board*, 305 U. S. 197 (p. 32, *supra*); *Allen-Bradley Local* v. *Wisconsin Employment Relations Board*, 315 U. S. 740 (p. 33, *supra*), and the subsequent decisions of the New York Court of Appeals in *Duroga-City Radio* v. *New York State Labor Relations Board*, 281 N. Y. 13 (p. 34, *supra*), and of the Wisconsin Supreme Court in *Wisconsin Employment Relations Board* v. *Racping Leather Co.*, 228 Wisc. 473, 279 N. W. 673 (p. 15, *supra*).

In July, 1937, the two Boards reached an understanding as to the practical allocation of matters between them. That understanding was embodied in a letter, dated July 12, 1937, from Reverend John P. Boland, then Chairman of

the New York Board, to Honorable J. Warren Madden, then Chairman of the National Board (Solicitor General's Brief, pp. 103-5). The understanding, in substance, provided that certain categories of labor controversies were to be handled by the New York Board "without clearing, except as a matter of record, with the National Board's officials." Other categories of cases were to be handled by the National Board. Where doubt existed as to which Board should handle a particular matter, the Board with which the matter was first filed was to "clear" it with the other Board.

This understanding between the Boards necessarily was based upon mutual acknowledgment of the existence of jurisdiction in the New York Board, concurrent with that of the National Board, over labor controversies occurring within the State of New York and affecting commerce. Obviously, no such understanding could have been reached unless the New York Board had concurrent jurisdiction. [23]

During the nine years that have elapsed the New York Board continously has exercised its concurrent jurisdiction in many matters affecting commerce and over which the National Board could have exercised its superior jurisdiction had it desired to do so. A list of illustrative cases is attached hereto as Appendix D (pp. 92-5, *infra*). [24]

In many of these "commerce" matters the National Board expressly referred the parties to the New York

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23. See, for instance, *Matter of G. Schirmer, Inc.*, 5 N. Y. S. L. R. B. 72. The New York Board advised the National Board that the New York Board would proceed to investigate a petition filed with it unless the National Board asserted jurisdiction. The National Board replied that it did not object to the New York Board handling the matter "under the theory of our concurrent jurisdiction" (5 N. Y. S. L. R. B., at 73).

24. The appellant Allegheny stipulated that "the Court may in considering this case refer to and take cognizance of any and all decisions of the National Labor Relations Board and the State Labor Relations Board" (Record, p. 58).

In respect to the administrative interpretation placed upon a statute the Court may consider data which is not contained in the record (*U. S.* v. *Magnolia Petroleum Co.*, 110 F. 2d 212, 219, citing *Minn.* v. *U. S.*, 305 U. S. 382).

Board. A recent illustration of this is the National Board's advice to the New York Board that, although the National Board could assert jurisdiction in matters involving brokerage houses and financial institutions, it will not at this time entertain such matters and has no objection to the New York Board entertaining them (Minute of National Labor Relations Board, August 16, 1946, Solicitor General's Brief, pp. 105, 106).

For example, in *Matter of Harris-Upham Co.*, 9 N. Y. S. L. R. B. ——, not yet reported, Decision No. 3683 (August 30, 1946), 18 L. R. R. M. 1384, the National Board advised the New York Board by letter dated August 15, 1946:

> "* * * that since the above company is engaged in the brokerage business, although in our opinion the National Labor Relations Board could assert jurisdiction, cases involving brokerage houses and other financial institutions will be referred to you until such time as some labor organization attempts to set up a nation-wide unit in enterprises of said nature."

The National Board's referral of the *Harris-Upham* case to the New York Board is particularly significant because that company is chiefly and directly engaged in interstate commerce (*Polish Nat'l Alliance* v. *National Labor Relations Board*, 322 U. S. 643).

The company is a member of various exchanges throughout the country. In addition to its principal office in New York City, it maintains offices in 24 cities throughout the United States and one in Switzerland. These offices outside New York State execute their own orders on local exchanges and also execute orders for and through the New York office. All confirmations to customers are sent either from the New York City office or from the Kansas City, Missouri, office. The company also executes orders for corresponding brokers located throughout the country. Approximately 75 per cent. of the orders executed by the company originate outside New York State. Of its approxi-

mately 860 employees, about 380 work within New York State and 480 outside New York State. The union conceded not only that the company's activities affect interstate commerce, but that the company is itself engaged in interstate commerce.

Thirty-one petitions involving brokerage houses, banks, and similar enterprises are now being processed by the New York Board.

In another recent case (*Matter of E. A. Laboratories, Inc.*, Case No. SE-10675, 8 N. Y. S. L. R. B. 49, Decision No. 2953, April 5, 1945, 16 L. R. R. 233) the National Board based a complaint of refusal to bargain (National Board Case No. 2-C-6259) upon the New York Board's certification of the Foremen's Association of America (the union involved in the cases at bar) as representative of the company's foremen. The company was engaged in the manufacture of aircraft lighting assemblies, tank equipment, gun sights and generator power plants. The company also sub-contracted work for other manufacturers. Ninety-eight per cent. of the raw materials, such as steel, copper, and brass, were bought outside of New York State. About 95 per cent. of the manufactured products were shipped to points outside New York State. The union conceded that the activities of the company affected interstate commerce.

Thus, the National Board acknowledged as valid, and acted upon, the New York Board's certification in a matter directly affecting interstate commerce. [25]

In another instance, *Matter of Savage Arms Corp.*, 8 N. Y. S. L. R. B. 322, Decision No. 3052 (July 14, 1945), 17

25. Letter from National Board, June 5, 1946:

"We are about to issue a complaint against the above-named company [E. A. Laboratories, Inc.], alleging in part that in violation of the National Labor Relations Act, the company refused to bargain with the Foremen's Association of America, Chapter 104.

"That aspect of our case will be based upon your certification of that organization in your case No. SE-10675, Decision No. 2953."

The letter then requestgd a transcript of the record before the New York Board and of the decision and certification, in order that they might be incorporated in the record in the National Board proceeding.

L. R. R. 206, a union filed separate petitions with the New York Board, seeking in one to be certified as representative of foremen and assistant foremen (New York Board Case No. CE-385) and in the other, as representative of leaders and machine setters (New York Board Case No. CE-387), at the company's plant in Utica, New York. The Utica plant was engaged in the manufacture of machine guns and other weapons. In addition to its plant in Utica, the company, a Delaware corporation, had a manufacturing plant in Massachusetts. Ninety per cent. of the raw materials used in the Utica plant came from outside New York State, and over 90 per cent. of the finished product was shipped outside the State.

The same union also had a petition pending with the National Board, seeking certification as representative of the company's production employees in the same plant (National Board Case No. 3-R-961). The New York Board notified the National Board of the petitions filed with it. The National Board suggested that the New York Board refer the union to the National Board so far as representation of the leaders and machine setters was concerned (New York Board Case No. CE-387), inasmuch as such employees are usually included in the same unit with rank and file employees. The National Board further suggested, however, that the New York Board proceed to process the petition relating to the company's foremen and assistant foremen (New York Board Case No. CE-385). The New York Board advised the union to withdraw the petition relating to the leaders and machine setters and refile it with the National Board. The union did so (National Board Case No. 3-R-994). The New York Board proceeded on the petition relating to the foremen and assistant foremen.

The National Board issued its Decision and Direction of Election on July 6, 1945. The National Board included the machine setters and leaders in the unit of production employees, and excluded the foremen and assistant foremen

(62 N. L. R. B. 1156, 1159). The New York Board issued its Decision and Direction of Election on July 14, 1945, finding that the foremen and assistant foremen constituted an appropriate bargaining unit.

To insure that the outcome of one election would not affect the other, the elections were conducted by the respective Boards on the same day, by mutual arrangement, and the ballots counted and the results announced simultaneously.

The *Savage Arms* matter is especially pertinent here. It involved the New York plant of an interstate manufacturing enterprise. The National Board processed the petitions concerning the rank and file employees in the New York plant. The National Board suggested that the New York Board process the petition concerning representation of the foremen in the same plant. The two Boards, by mutual arrangement, conducted elections on the same day.

The concurrent jurisdiction of the New York Board is also demonstrated by various cases involving the Montgomery Ward Company. That company operates a wholesale and retail merchandising business and maintains nine mail order houses, approximately 650 retail stores, 200 catalogue offices and various warehouses throughout the country.

The New York Board has handled a number of cases involving the employees of Montgomery Ward and Company with the knowledge and acquiescence of the National Board. In 1939 a petition was filed with the New York Board concerning the selling, non-selling and office employees of the company's store in Queens, New York City (New York Board, Case No. SE-3838). The New York Board notified the National Board of the filing of the petition. The National Board asked that the matter be referred to it. The New York Board advised the union to withdraw its petition and file it with the National Board.

A year later a union filed a petition with the National Board concerning those same employees (National Board Case No. II-R-1958). The National Board advised the union to withdraw the petition and file it with the New York Board. The New York Board processed the petition (Case No. SE-6364, 4 N. Y. S. L. R. B. 208). After the union had been certified, a refusal to bargain charge was filed (New York Board Case No. SU-7218). The New York Board issued an order directing the company to cease refusing to bargain (5 N. Y. S. L. R. B. 441). The order was upheld by the New York courts (179 N. Y. Misc. 298, aff'd 266 N. Y. App. Div. 878).

Other *Montgomery Ward* cases filed with the New York Board involved unfair labor practices committed at the company's store in Kingston, New York (5 N. Y. S. L. R. B. 1067) controversies concerning representation of employees in the company's mail order house at Albany, New York, two warehouses in Albany and Troy, New York, and a retail store in Menands, New York (7 N. Y. S. L. R. B. 24); and alleged unfair labor practices in the company's mail order department and its store in Menands, New York (New York Board Cases No. CU-413; CU-343) and its store in Rockport, New York (New York Board Case No. WU-370).

The *Montgomery Ward* cases are of particular importance in showing the concurrent jurisdiction of the New York Board, for the National Board referred the parties to the New York Board although the National Board at all times accepted jurisdiction over cases in other states involving that same company. [26]

The concurrent jurisdiction of the New York Board has served the common objective of both Acts, namely, to promote the cause of industrial peace and stability by assur-

26. See, *e. g.*, 4 N. L. R. B. 1151 (Missouri); 9 N. L. R. B. 538 (Oregon); 17 N. L. R. B. 191 (Minnesota); 25 N. L. R. B. 318 (Illinois); 29 N. L. R. B. 1120 (Maryland).

ing to employees the right to organize and bargain collectively through representatives of their own choosing (National Act, Sec. 1; N. Y. State Act, Sec. 700; N. Y. State Constitution, Art. 1, Sec. 17). As far back as 1938 the National Board declared (Third Annual Report, p. 3):

> "In its last report the Board stated that it looked with favor on the adoption of State labor relations acts patterned after the National Labor Relations Act.
>
> . . . . . .
>
> "Last year the Board also reported that it hoped to make cooperative arrangements with the State boards to the end that administrative friction and lack of uniformity in the application of principles would not ensue. This hope has been completely fulfilled and the Board or its agents has been able to achieve satisfactory working arrangements with all of the State boards or their agents . . . ."

The administrative construction given to the National and New York Acts is of great persuasive force. The construction placed upon a statute by those charged with the duty of administering it is entitled to great weight and, particularly so, where the construction has been implemented by a course of conduct over a long period of time (*Minty* v. *Baldwin*, 289 U. S. 346, 351; *Norwegian Nitrogen Co.* v. *U. S.*, 288 U. S. 294, 311, 315; *Medo Photo Supply Corp.* v. *National Labor Relations Board*, 321 U. S. 678, 681; *U. S.* v. *Jackson*, 280 U. S. 183; *Louisville & N. R. Co.* v. *U. S.*, 282 U. S. 740; *Brewster* v. *Gage*, 280 U. S. 327; *Maynard* v. *Elliott*, 283 U. S. 273; *Beers* v. *Hotchkiss*, 256 N. Y. 41; *Lattauer* v. *Stern*, 477 N. Y. 233).

Nine years have brought no indication of a contrary Congressional intent.

The foregoing makes it clear that the New York Board had concurrent jurisdiction over the controversies concerning representation of appellants' foremen in their New

York plants. The proceedings taken by the New York Board herein are valid and effective, since the National Board did not assume or assert jurisdiction. The National Board did not request the New York Board to refer the instant cases to it or to refrain from taking jurisdiction over them.

The appellant Bethlehem (Brief, p. 11) stresses the fact that the National Board has exercised jurisdiction over previous labor controversies involving employees at its New York plant. That is immaterial. The prior action taken by the National Board concerned *only the rank and file employees*. After elections, the National Board certified the United Steel Workers of America, C. I. O., as the exclusive bargaining representative of certain groups of rank and file employees. *The determinative fact of record, however, is that Bethlehem's foremen were not involved in those proceedings before the National Board.*

Nor did the action of the New York Board infringe upon the rank and file units previously established by the National Board. The units of rank and file employees found by the National Board and the unit of foremen found by the New York Board were and are exclusive of each other. [27]

Moreover, the Foremen's Association of America is an independent labor organization admitting only foremen to membership and having no connection with the United Steel Workers of America, which represents the rank and file employees (Allegheny Record, pp. 20-21, 26, 29).

27. *Cf.* the *Savage Arms* case (p. 57, *supra*), where the National Board conducted a rank and file election simultaneously and in cooperation with the New York Board's conduct of a foremen's election.

See also the *Harris Upham* case (p. 55, *supra*), where the National Board previously had conducted an election among some of the very same employees involved in the subsequent proceeding before the New York Board; and the *Montgomery Ward* case (p. 58, *supra*), where the National Board and the New York Board handled the same group of employees successively.

B

Practical considerations support the New York Board's jurisdiction.

The theory of concurrent jurisdiction, and the "co-operative arrangements" which the National and New York Boards have observed for the past nine years (see National Board's Third Annual Report, quoted p. 60, *supra*), have substantially contributed to the accomplishment of the National Act's objectives. Indeed, the application of the New York Act in the cases at bar actually removed an obstruction to interstate commerce (pp. 51-2, *supra*).

Denial to the New York Board of concurrent jurisdiction over disputes occurring within New York and affecting commerce, would require discontinuance of this long-standing cooperation, complicate and increase the work of both Boards and decrease their usefulness.

It would result in a tremendous increase in the number of cases filed with the National Board. This increase would overburden the National Board, first, because its case load has been greatly augmented since the removal of war-time controls and is still increasing; second, because sharp budgetary cuts in the appropriations of the National Board have resulted in the discharge of many of the employees necessary to handle the volume of labor matters; and third, because the National Board would be saddled with an ever-increasing task of determining whether alleged intra-state cases are in the interstate class and hence within the National Board's jurisdiction (*e. g.*, the *Consolidated Edison* case, 305 U. S. 197, p. 32, *supra*), or whether alleged interstate cases are in the intra-state class and hence not within the National Board's jurisdiction—all of which would complicate the National Board's work to such an extent as to make it exceedingly difficult, if not impossible,

to make a speedy determination of the real interstate commerce cases. [28]

It would introduce jurisdictional questions into *practically every matter* before the New York Board, and would invite delay, not only in proceedings before the Board, but through suits for declaratory judgment, in which employers or unions assert that interstate commerce is affected or involved and that therefore jurisdiction rests, as a matter of law, exclusively with the National Board. In such matters the work of the New York Board would be brought to a standstill until after long periods of time had elapsed and the jurisdictional questions had been passed upon by the New York Courts and possibly by this Court. Such a state of affairs obviously would block expeditious determination of labor disputes, and increase the number of strikes, lockouts and other forms of economic strife—the very evils which both the National Act and the New York Act were designed to reduce. [29]

It would result in the creation of a "no man's land" in which both Acts could be evaded with impunity. If a labor controversy occurring within New York and affecting com-

28. On August 15, 1946, the National Board began a 22 per cent. personnel reduction as a result of a $677,400 cut in its appropriation for the 1947 fiscal year. The Board estimated that present funds will permit processing only 10,800 of the 15,000 cases anticipated before July 1, 1947, thus increasing the existing backlog of 4,600 cases to over 9,000 during the coming year. It announced that its work force of 985 persons would have to be cut to 850 by October 1, 1946 and to 760 by January 1, 1947.

At the same time, as against an average monthly total of new cases for 1945-1946 of 1,020, the totals of new cases received for May, June and July, 1946 averaged over 1,400 cases monthly.

The Board, translating this into terms of workers, factories, and possible industrial strife, said that it expected that "the reduced appropriation [may] * * * affect some 1,400 plants in communities throughout the country, [with] * * * the potentialities of individual turmoil * * * greatly increased." (See Washington Daily Reporter System, Report No. 163, August 16, 1946, Bureau of National Affairs, Washington, D. C.)

29. Since its inception on July 1, 1937 through October 31, 1946 the New York Board has handled 14,618 cases involving 581,730 employees. Although it is impracticable to review all those files, it is fair to say that, in the absence of concurrent jurisdiction, the majority of those cases, under the "affecting commerce" principle, could have given rise to jurisdictional questions and consequent litigation. See, for example, cases set forth in Appendix D hereto.

merce, can be resolved only by the National Board, and if, for reasons not going to the merits of the controversy as, for example, administrative or budgetary reasons, the National Board did not exercise its jurisdiction, the employees concerned would lose their rights despite the existence of the two Acts designed to safeguard such rights. As the New York Court of Appeals said in *Davega-City Radio* v. *New York State Labor Relations Board*, 281 N. Y. 13, 24-5):

> "In so far as is possible within the framework of our Federal form of government, such a result should be avoided. To permit State enforcement of a State law consistent with a Federal law on the same subject until such time as the appropriate Federal agency asserts its own jurisdiction in no way lessens the supremacy of the national laws as required by article VI of the Constitution."

For example, in the *Harris-Upham* case (p. 55, *supra*) the company contended that even though the National Board had declined to entertain a petition, the New York Board was without jurisdiction because of the interstate nature of the company's activities. Only the principle of concurrent jurisdiction made it possible for the New York Board to act in a situation which was instinct with the very mischief which both the National Act and the New York Act seek to eliminate.

It is asserted to be the problem of "practical enforcement" which now leads the National Board to take the position urged by the Solicitor General (Brief, p. 46n). The underlying factor, apparently, is the apprehension that concurrent jurisdiction in the New York Board would permit unions to "shop around" for a favorable forum, a procedure which, the National Board asserts, it is powerless to prevent or to remedy if a conflicting policy should be adopted by a State Board (Solicitor General's Brief, p. 56).

It is respectfully submitted that the contention is speculative, unsupported by the record and otherwise without merit.

The basis for the National Board's position is that it is not a quasi-legislative agency with power of affirmative regulation, but rather a "forum" to which the parties must first come, because the National Board "acts only when petitions or charges are filed with it" (Solicitor General's Brief, p. 56). [30] It is then stated that, although the National Board may be aware that a State Board is reaching a decision which it considers erroneous, "there is nothing [the National Board] can do to remedy the situation."

That same result, of course, might follow in cases which the National Board declines to accept and refers to the New York Board. But more important, the speculative fears of the National Board are not in accordance with past experience. In the four Wisconsin cases referred to by the Solicitor General (Brief, pp. 52-3) petitions or charges actually were filed with the National Board, and that Board exercised its paramount jurisdiction. [31] In the Pennsylvania case, [32] the Federal District Court held that it had jurisdiction to entertain an action to enjoin the Pennsylvania Board from conducting an election in a state-wide unit, where the National Board had previously dismissed a petition on the ground that such a unit was not appropriate. [33]

Thus, in each of the Wisconsin and Pennsylvania cases the National Board had opportunity to, and did, exercise its paramount jurisdiction, and the courts of both those

30. If such be the case, the argument advanced by the Solicitor General (pp. 45-8) that the "field" was one which Congress intended to occupy by "affirmative regulation" necessarily falls. Congress could hardly have intended to preclude application of the state's police power to matters traditionally of local concern by creating a federal agency whose power to act depends upon the discretion of private parties.

31. *Matter of Creamery Package Mfg. Co.*, N. L. R. B. Case #XII-R-341, R-2705; Wisconsin Bd. Case III, #348-E-117; *Matter of Fox River Valley Knitting Co.*, N. L. R. B. Case #XII-C-742; Wisconsin Bd. Case 1, #432-E-149; *Matter of Wilson Hurd Mfg. Co. Inc.*, 68 N. L. R. B. 853; *Matter of Evinrude Motors*, 66 N. L. R. B. 1142.

32. *United Office & Professional Workers* v. *Smiley*, 18 L. R. R. M. 2356.

33. The injunction was dissolved on the ground of improper venue only.

states, like the New York courts, have acknowledged that such action by the National Board overrides state action. [34]

In the cases at bar, the New York Board, before proceeding, notified the National Board, but the National Board neither requested referral of the cases to it, nor requested the New York Board not to act.

Thus, in the few instances cited by the Solicitor General, the National Board either acted or was consulted before the State Board acted. Accordingly, the professed dangers of "shopping around" do not find support in past experience.

Moreover, the National Board's alleged inability to prevent a union from "shopping around" for a favorable forum, is self-imposed. It arises from the National Board's own Rules, sections 203.46, 203.47 and 203.49 (formerly Article III, secs. 1, 2 and 3) which prohibit its Regional Directors from accepting or investigating employer petitions unless it is alleged that the controversy concerning representation involves two or more unions. The National Act contains no prohibition against the filing or investigation of employer petitions. The National Board itself has said that its reluctance to investigate employer petitions is based not upon doubt as to its powers, but upon discretion (First Annual Report, pp. 25-6). Thus, it is patently within the power of the National Board, by amendment of its own rules, to eliminate shopping around, for where either the employer or the union is free to invoke the jurisdiction of the paramount national agency the other cannot effectively select a "favorable forum." [35]

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34. *Davega City Radio* v. *New York State Labor Relations Board*, 281 N. Y. 13; 22 N. E. 2d 445; *Wisc. Emp. Rel. Bd.* v. *Rueping Leather Co.*, 228 Wisc. 473; 279 N. W. 673; *In re York Tel. & Tel. Companies' Employees*, Pa. Ct. Common Pleas September 21, 1945; 17 L. R. R. 175.

35. The Rules were renumbered and amended September 11, 1946. The amendments are not here material. The pertinent sections of the Rules are printed in Appendix C hereto (pp. 87-91, *infra*).

Further, even without amendment of its rules, the National Board's paramount jurisdiction may be invoked and asserted so as to prevent "shopping around." Even though but one union was involved in each of the cases at bar, the appellants could have asked the National Board directly for permission to file a petition with it, rather than with a regional office, and the Board could have granted permission and investigated (section 203.58a; formerly Art. III, sec. 13a).

Thus, the appellants could have avoided the disability imposed upon regional offices, and the National Board itself, being under no disability, could have acted.

Or appellants could have filed a petition with the National Board's regional office and appealed to the National Board from the Regional Director's refusal to act (section 203.57b, formerly Art. III, sec. 4; sections 203.58b, 203.58c-1, formerly Art. III, secs. 13b, 13c-1).

Finally, it does not appear that the filing of a petition is a prerequisite to National Board action in a representation case. [36] Section 9c of the National Act merely says that "Whenever a question affecting commerce arises concerning the representation of employees, the Board may investigate such controversy * * *." And Section 203.58 (formerly Art. III, sec. 13) of the National Board's Rules, provides that: "Whenever the Board deems it necessary in order to effectuate the purposes of the Act, it may * * * (b) upon its own motion conduct, or direct any member, Regional Director, or other agent or agency to conduct an investigation under Section 9(c) of the Act; * * *." And Section 203.73 (formerly Art. IX, sec. 1) provides that the Rules "shall be liberally construed to effectuate the purposes and policy of the Act."

36. First Annual Report of National Board, pages 25-6; Report of the Attorney General's Committee on Administrative Procedure, Monograph No. 18, "National Labor Relations Board" (1940), page 75, footnote 126.

Accordingly, it seems clear that the National Board itself could have initiated action in the cases at bar, if it had so desired.

The appellants do not assert that they ever made any attempt to invoke the National Board's jurisdiction. So far as the New York Board is aware, no attempt was made. Nor did the National Board make any attempt to initiate proceedings, despite the fact that the procedures mentioned above were available to both appellants and the National Board.

The New York Board notified the National Board that petitions concerning representation of appellants' foremen had been filed, and asked if the National Board wished to take jurisdiction (*Bethlehem* R., p. 57).

If the National Board wanted to handle the petitions, or objected to the New York Board processing them, it is reasonable to assume that the National Board would have said so; but no such statement was forthcoming. [37] Neither then, nor later while the cases were being processed by the New York Board, did the National Board ask that the cases be referred to it or say that the New York Board should not proceed, or that their letters (*Allegheny* R., p. 45; *Bethlehem* R., p. 56) constituted an assertion of jurisdiction. [38] Not until January, 1945 (Solicitor General's Brief, p. 93), after the National Board had begun hearings in the *Packard* case, did the National Board even request discussion.

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37. The cases involved the so-called "foreman issue." The appellants contended unsuccessfully before the New York Board and the New York Courts that their foremen are "employers" within the meaning of Section 701, subdivision 2, of the New York Act, and not "employees" within the meaning of Section 701, subdivision 3. (Section 2, subdivisions 2 and 3 of the National Act are identical with Section 701, subdivisions 2 and 3 of the New York Act so far as material to that issue.)

38. Compare the National Board's letter of October 9, 1946 re Rosenberg, d/b/a Edro Mfg. Co., New York Board Case No. SU-12633, SE-13363:

> "We have reviewed the circumstances set forth in your letter [letter of New York Board] and are of the opinion that the [National] Board will assert jurisdiction. Accordingly, we suggest that you notify the parties to this effect. We anticipate that we may have access to your files in the event that the matter is filed with us."

At the April, 1945 conference between representatives of the National Board and the New York Board (Solicitor General's Brief, pp. 100-3) the National Board representatives suggested that since the National Board was again entertaining foremen's petitions, future cases involving large manufacturing establishments doing interstate business, preferably should be processed by the National Board. The New York Board pointed to its obligation to contribute to industrial peace within the state and reserved its position that it was advisable for the New York Board to entertain petitions for units of supervisory employees, where it was doubtful whether the National Board would proceed with the case were it filed with the latter Board. The New York Board agreed, however, not to reach out for cases of that character and to advise the National Board of any such cases which the New York Board decided to entertain (Solicitor General's Brief, p. 102).

The National Board representatives did not ask, and up to the present time have not asked, the New York Board to refrain from proceeding further with the still pending representation proceeding involving foremen of the appellant *Bethlehem*, or with the unfair labor practice proceeding involving the appellant *Allegheny*, in which the Board directed *Allegheny* to bargain with the foremen's union previously certified (Case No. WU-404, 9 N. Y. S. L. R. B.——, not yet reported, Decision No. 3519, May 29, 1946).

C

Concurrent jurisdiction has not only "worked out well," but is consonant with established legal principles.

The National Board itself admits that the practical construction of the two Acts, adopted by the respective Boards and in effect for over nine years, has "worked out well" (Memorandum of General Counsel of National Board, Solicitor General's Brief, p. 96). As the Solicitor

General has recognized with regard to coexistent Federal and state legislation concerning price and wage controls, the existence of state legislation "might lessen a difficult Federal policing problem and thus greatly facilitate enforcement of the Congressional policy" (Solicitor General's Brief, p. 41). The National Act and the New York Act are practically identical, both in language and policy. The National Board, concededly, because of administrative and budgetary considerations, is unable to handle all the controversies over which it has jurisdiction (Solicitor General's Brief, pp. 67-8). Accordingly, as the Solicitor General states (Brief, p. 69), "it is obviously more consonant with the policy of the national statute to permit enforcement of state laws embodying the same policy than to leave the employees' rights without any statutory protection." Particularly is that true, where, as here, a contrary holding would bar the exercise of New York's police power to reduce industrial strife within the borders of the state. [39]

The Solicitor General says (Brief, p. 76):

> "We think the practical approach to the problem of concurrent jurisdiction by the New York and National Boards points the way to the proper solution of the constitutional problem."

He further states (Brief, p. 70):

> "The National Board may announce a general policy of declining jurisdiction in an entire class of cases. (See, for example, the National Board's declaration as to New York brokerage houses, pp. 75-76, *infra;* and the over-all agreement between the National and New York Boards as to which cases shall be handled by each, pp. 71-73, *infra.*) In such cases the

39. The position thus taken by the Solicitor General is inconsistent with his previous argument that the existence of discretionary powers in the Boards precludes state legislation even though its policy is identical with that of the National Act (Solicitor General's Brief, p. 51).

Compare also this "discretion" argument with the statement (Solicitor General's Brief, p. 34) that the obligations of employers are imposed by the National Act, and not by the National Board.

> National Board's announcement of general policy is itself adequate to justify the initiation of proceedings before the State Board."

Those statements, like the nine-year course of conduct on the part of the Boards, can only be grounded on the theory that the New York Board has concurrent jurisdiction in cases affecting commerce and may lawfully act until the National Board assumes or asserts its paramount jurisdiction. Certainly neither those statements nor the procedure which the Boards have followed is compatible with any theory of pre-emption. There is no basis for a proposition that the National Act is pre-emptive except "when the National Board indicates that it will decline to assume jurisdiction over the particular case or class of cases—" (Solicitor General's Brief, p. 71). *The National Act makes no distinction among cases affecting commerce.* If the National Act is pre-emptive, then that pre-emption would extend as a matter of law to any case which "affects commerce" (National Act, sec. 2, subd. 7; sec. 9, subd. c), and there would be no room for the New York Board to act, even with the consent of the National Board. Thus, the theory of concurrent jurisdiction is indispensable to the position taken by the Solicitor General.

The Solicitor General's contention, therefore, ultimately reduces to the proposition that where the National Board takes jurisdiction on a case to case basis, the New York Board is without jurisdiction to act in labor controversies affecting commerce unless and until the National Board, by declaration, confers jurisdiction upon it; in other words, that the concurrent jurisdiction of the New York Board comes into existence only at the option of the National Board (Solicitor General's Brief, p. 70).

In this, the Solicitor General departs from the practical construction long followed by the two Boards and offers

a theory without precedent in law. It is respectfully submitted that there is no basis or authority for the theory that the National Board may confer upon the New York Board an otherwise non-existent jurisdiction. [40]

On the other hand, the practical construction heretofore adopted by the Boards, based on the theory that the New York Board has jurisdiction to act until superseded by the paramount federal power, is consonant with firmly established principles. The states' police power does not arise by declaration of a federal agency. It is inherent in the states and it is operative until the federal agency assumes or asserts jurisdiction.

If the National Board desires to alter the present method of clearing cases between the two Boards, that is a matter for future discussion between them. It is not material to whether the New York Board has concurrent jurisdiction, for, as we have said, that theory affords the only basis on which the New York Board could act in cases affecting commerce, whether the National Board expresses itself before, during or after the New York Board's action.

In any event, a desire for future change is not ground for nullifying action on the part of the New York Board, taken with knowing acquiescence on the part of the National Board, and in full accordance with the theory of concurrent jurisdiction to which both Boards consistently have adhered.

40. Section 4a of the National Act empowering the National Board to "establish or utilize such regional, local, or other agencies * * *" (Solicitor General's Brief, pp. 63-4) refers to federal agencies or instrumentalities. The National Board enforces the National Act. The New York Board enforces the New York Act. Neither enforces the Act of the other. Nothing in the National Act empowers the states to enforce it.

CONCLUSION

The order of the Court below in the *Bethlehem* case, No. (55), and the judgment of the Court below in the *Allegheny* case, No. (76), should be affirmed.

Respectfully submitted,

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[APPENDICES FOLLOW]

APPENDIX A

The pertinent provisions of the New York State Labor Relations Act (New York Laws of 1937, Chapter 443, as amended by the New York Laws of 1942, Chapter 518; 30 McKinney's Consolidated Laws of New York, § 700–716) are as follows:

SEC. 700. FINDINGS AND POLICY.—The economic necessity for employees to possess full freedom of association, actual liberty of contract and bargaining power equal to that of their employers, who are frequently organized in corporate or other forms of association, has long been sanctioned by public opinion, and recognized and affirmed by legislatures and the highest courts. As the modern industrial system has progressed, there has developed between and among employees and employers another greater economic interdependence and community of interest which have become matters of vital public concern. Employers and employees have recognized that the peaceable practice and wholesome development of that relationship and interest are materially aided by the general adoption and advancement of the procedure and practice of bargaining collectively as between equals. It is in the public interest that equality of bargaining power be established and maintained. It is likewise recognized that the denial by some employers of the right of employees freely to organize and the resultant refusal to accept the procedure of collective bargaining, substantially and adversely affect the interest of employees, other employers, and the public in general. Such denial creates variations and instability in competitive wage rates and working conditions within and between industries and between employees and employers engaged in such industries, and by depressing the purchasing power of wage earners and the profits of business, and tends (a) to produce and aggravate recurrent business depressions, (b) to increase the disparity between production and consumption, (c) to create unemployment with its attendant dangers to the health, peace and morale of the people, and (d) to

increase public and private expenditures for relief of the needy and the unemployed.

When some employers deny the right of employees to full freedom of association and organization, and refuse to recognize the practice and procedure of collective bargaining, their actions lead to strikes, lockouts and other forms of industrial strife and unrest which are inimical to the public safety and welfare, and frequently endanger the public health.

Experience has proved that protection by law of the right of employees to organize and bargain collectively, removes certain recognized sources of industrial strife and unrest, encourages practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours or other working conditions, and tends to restore equality of bargaining power between and among employers and employees, thereby advancing the interests of employers as well as employees.

In the interpretation and application of this article, and otherwise, it is hereby declared to be the public policy of the state to encourage the practice and procedure of collective bargaining, and to protect employees in the exercise of full freedom of association, self-organization and designation of representatives of their own choosing for the purposes of collective bargaining, or other mutual aid and protection, free from the interference, restraint or coercion of their employers.

All the provisions of this article shall be liberally construed for the accomplishment of this purpose.

This article shall be deemed an exercise of the police power of the state for the protection of the public welfare, prosperity, health and peace of the people of the state.

SEC. 701. DEFINITIONS. When used in this article:

. . . . . .

2. The term "employer" includes any person acting on behalf of or in the interest of an employer,

directly or indirectly, with or without his knowledge, but a labor organization or any officer or agent thereof shall only be considered an employer with respect to individuals employed by such organization.

3. The term "employees" includes but is not restricted to any individual employed by a labor organization; any individual whose employment has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment; and shall not be limited to the employees of a particular employer, unless the article explicitly states otherwise, but shall not include any individual employed by his parent or spouse or in the domestic service of any person in his home, or any individuals employed only for the duration of a labor dispute, or any individuals employed as farm laborers.

SEC. 703. RIGHTS OF EMPLOYEES.—Employees shall have the right of self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection, free from interference, restraint, or coercion of employers, but nothing contained in this article shall be interpreted to prohibit employees from exercising the right to confer with their employer at any time, provided that during such conference there is no attempt by the employer, directly or indirectly, to interfere with, restrain or coerce employees in the exercise of the rights guaranteed by this section.

SEC. 704. UNFAIR LABOR PRACTICES.—It shall be an unfair labor practice for an employer:

1. To spy upon or keep under surveillance, whether directly or through agents or any other person, any activities of employees or their representatives in the exercise of the rights guaranteed by section seven hundred three.

2. To prepare, maintain, distribute or circulate any blacklist of individuals for the purpose of preventing any of such individuals from obtaining or retaining employment because of the exercise by such individuals of any of the rights guaranteed by section seven hundred three.

3. To dominate or interfere with the formation, existence, or administration of any employee organization or association, agency or plan which exists in whole or in part for the purpose of dealing with employers concerning terms or conditions of employment, labor disputes or grievances, or to contribute financial or other support to any such organization, by any means, including but not limited to the following: (a) by participating or assisting in, supervising, controlling or dominating (1) the initiation or creation of any such employee organization or association, agency, or plan, or (2) the meetings, management, operation, elections, formulation or amendment of constitution, rules or policies, of any such employee organization or association, agency or plan; (b) by urging the employees to join any such employee organization or association, agency or plan for the purpose of encouraging membership in the same; (c) by compensating any employee or individual for services performed in behalf of any such employee organization or association, agency or plan, or by donating free services, equipment, materials, office or meeting space or anything else of value for the use of any such employee organization or association, agency or plan; provided that, an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay.

4. To require an employee or one seeking employment, as a condition of employment, to join any company union or to refrain from forming, or joining or assisting a labor organization of his own choosing.

5. To encourage membership in any company union or discourage membership in any labor organization, by discrimination in regard to hire or tenure or in any term or condition of employment:

Provided that nothing in this article shall preclude an employer from making an agreement with a labor organization requiring as a condition of employment membership therein, if such labor organization is the representative of employees as provided in section seven hundred five.

6. To refuse to bargain collectively with the representatives of employees, subject to the provisions of section seven hundred five.

7. To refuse to discuss grievances with representatives of employees, subject to the provisions of section seven hundred five.

8. To discharge or otherwise discriminate against an employee because he has signed or filed any affidavit, petition or complaint or given any information or testimony under this article.

9. To distribute or circulate any blacklist of individuals exercising any right created or confirmed by this article or of members of a labor organization, or to inform any person of the exercise by any individual of such right, or of the membership of any individual in a labor organization for the purpose of preventing individuals so blacklisted or so named from obtaining or retaining employment.

10. To do any acts, other than those already enumerated in this section, which interfere with, restrain or coerce employees in the exercise of the rights guaranteed by section seven hundred three.

SEC. 705. REPRESENTATIVES AND ELECTIONS.—1. Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes or by the majority of the employees voting in an election conducted pursuant to this section shall be the exclusive representatives of all the employees in the appropriate unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: Provided, that employees, directly or through representatives, shall have the right at any time to present grievances to their employer.

2. The Board shall decide in each case whether, in order to insure to employees the full benefit of their right to self-organization, to collective bargaining and otherwise to effectuate the policies of this article, the unit appropriate for the purposes of collective bargaining shall be the employer unit, multiple employer unit, craft unit, plant unit, or any other unit; provided, however, that in any case where the majority of employees of a particular craft shall so decide the board shall designate such craft as a unit appropriate for the purpose of collective bargaining.

3. Whenever it is alleged by an employee or his representative, or by an employer or his representative, that there is a question or controversy concerning the representation of employees, the board shall investigate such question or controversy and certify in writing to all persons concerned the name or names of the representatives who have been designated or selected. In any such investigation the board shall provide for an appropriate hearing upon due notice, either in conjunction with a proceeding under section seven hundred six or otherwise, and may conduct an election by secret ballot of employees, or use any other suitable method to ascertain such representatives (either before or after the aforesaid hearing), provided, however, that the board shall not have authority to investigate any question or controversy between individuals or groups within the same labor organization or between labor organizations affiliated with the same parent labor organization.

* * * * * * *

SEC. 706. PREVENTION OF UNFAIR LABOR PRACTICES. —1. The Board is empowered and directed, as hereinafter provided, to prevent any employer from engaging in any unfair labor practice. This power shall not be affected or impaired by any means of adjustment, mediation or conciliation in labor disputes that have been or may hereafter be established by law.

* * * * * * *

SEC. 715. APPLICATION OF ARTICLE.—The provisions of this article shall not apply to the employees of any employer who concedes to and agrees with the board that such employees are subject to and protected by the provisions of the national labor relations act or the federal railway labor act . . . .

. . . . . .

APPENDIX B

The pertinent provisions of the National Labor Relations Act (Act of July 5, 1935, 49 Stat. 449, 29 U. S. C. 151 *et seq.*) are as follows:

SECTION 1. The denial by employers of the right of employees to organize and the refusal by employers to accept the procedure of collective bargaining lead to strikes and other forms of industrial strife or unrest, which have the intent or the necessary effect of burdening or obstructing commerce by (a) impairing the efficiency, safety, or operation of the instrumentalities of commerce; (b) occurring in the current of commerce; (c) materially affecting, restraining, or controlling the flow of raw materials or manufactured or processed goods from or into the channels of commerce, or the prices of such materials or goods in commerce; or (d) causing diminution of employment and wages in such volume as substantially to impair or disrupt the market for goods flowing from or into the channels of commerce.

The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association substantially burdens and affects the flow of commerce, and tends to aggravate recurrent business depressions, by depressing wage rates and the purchasing power of wage earners in industry and by preventing the stabilization of competitive wage rates and working conditions within and between industries.

Experience has proved that protection by law of the right to employees to organize and bargain collectively safeguards commerce from injury, impairment, or interruption, and promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest, by encouraging practices fundamental to the friendly adjustment of industrial

disputes arising out of differences as to wages, hours, or other working conditions, and by restoring equality of bargaining power between employers and employees.

It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

* * * * * * *

SEC. 2. When used in this Act—

* * * * * * *

(2) The term "employer" includes any person acting in the interest of an employer, directly or indirectly, but shall not include the United States or any State or political subdivision thereof, or any person subject to the Railway Labor Act, as amended from time to time, or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization.

(3) The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse.

* * * * * * *

(6) The term "commerce" means trade, traffic, commerce, transportation, or communication among the several States, or between the District of Columbia or any Territory of the United States and any State or other Territory, or between any foreign country and any State, Territory, or the District of Columbia, or within the District of Columbia or any Territory, or between points in the same State but through any other State or any Territory or the District of Columbia or any foreign country.

(7) The term "affecting commerce" means in commerce, or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce.

* * * * * * *

SEC. 4. (a)

* * * * * * *

The Board may establish or utilize such regional, local, or other agencies, and utilize such voluntary and uncompensated services, as may from time to time be needed.

* * * * * * *

SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection.

SEC. 8. It shall be an unfair labor practice for an employer—

(1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7.

(2) To dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: *Provided*, That subject to rules and regulations made and pub-

lished by the Board pursuant to section 6 (a), an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay.

(3) By discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided*, That nothing in this Act, or in the National Industrial Recovery Act (U. S. C., Supp. VII, title 15, secs. 701–712), as amended from time to time, or in any code or agreement approved or prescribed thereunder, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in this Act as an unfair labor practice) to require, as a condition of employment, membership therein, if such labor organization is the representative of the employees as provided in section 9 (a), in the appropriate collective bargaining unit covered by such agreement when made.

(4) To discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this Act.

(5) To refuse to bargain collectively with the representatives of his employees, subject to the provisions of Section 9 (a).

* * * * * * * * *

SEC. 9. (a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: *Provided*, That any individual employee or a group of employees shall have the right at any time to present grievances to their employer.

(b) The Board shall decide in each case whether, in order to insure to employees the full benefit of their right to self-organization and to collective bar-

gaining, and otherwise to effectuate the policies of this Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof.

(c) Whenever a question affecting commerce arises concerning the representation of employees, the Board may investigate such controversy and certify to the parties, in writing, the name or names of the representatives that have been designated or selected. In any such investigation, the Board shall provide for an appropriate hearing upon due notice, either in conjunction with a proceeding under section 10 or otherwise, and may take a secret ballot of employees, or utilize any other suitable method to ascertain such representatives.

* * * * * * *

SEC. 10. (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall be exclusive, and shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, code, law, or otherwise.

* * * * * * *

SEC. 14 Wherever the application of the provisions of section 7 (a) of the National Industrial Recovery Act (U. S. C., Supp. VII, title 15, sec. 707 (a)), as amended from time to time, or of section 77B, paragraphs (l) and (m) of the Act approved June 7, 1934, entitled "An Act to amend an Act entitled 'An Act to establish a uniform system of bankruptcy throughout the United States' approved July 1, 1898, and Acts amendatory thereof and supplementary thereto" (48 Stat. 922, pars. (l) and (m)), as amended from time to time, or of Public Resolution Numbered 44, approved June 19, 1934 (48 Stat. 1183), conflicts with the application of the provisions of this Act, this Act shall prevail: *Provided*, That in any situation where the provisions of this Act cannot be validly enforced, the provisions of such other Acts shall remain in full force and effect.

APPENDIX C

Rules and Regulations of the National Labor Relations Board, Series 4, effective September 11, 1946.

Series 4 renumbered and amended Series 3. Series 3 was adopted on November 26, 1943 and was in effect at the time of the events which gave rise to the cases at bar.

The amendments are not material to the cases at bar. The old section numbers appear in parentheses.

SEC. 203.46 (former Art. III, sec. 1). *Petition for certification; where to file; withdrawal.*—A petition to investigate and certify under Section 9 (c) of the Act the name or names of representatives designated or selected for the purpose of collective bargaining may be filed by an employee or any person or labor organization acting on behalf of employees, or by an employer. Such petition shall be in writing, the original being signed and sworn to before any notary public, Board agent, or other person duly authorized by law to administer oaths or take acknowledgments. Three copies of the petition shall be filed. Except as provided in Section 203.58, such petitions shall be filed with the Regional Director for the Region wherein the contemplated bargaining unit exists, or, if the contemplated bargaining unit exists in two or more Regions, with the Regional Director for any of such Regions. Prior to the transfer of the case to the Board, pursuant to Section 203.53, the petition may be withdrawn only with the consent of the Board or of the Regional Director with whom such petition was filed. After such transfer, a petition may be withdrawn only with the consent of the Board. Whenever the Board or Regional Director approve the withdrawal of any petition the case shall be closed.

SEC. 203.47 (former Art. III, sec. 2). *Contents of petition.*—(*a*) Such petition, when filed by an employee or

any person or labor organization acting on behalf of employees, shall contain the following:

(1) The name of the employer.

(2) The addresses of the establishments involved.

(3) The general nature of the employer's business.

(4) A description of the bargaining unit which the petitioner claims to be appropriate.

(5) The number of employees in the alleged appropriate unit.

(6) The names and addresses of any other persons or labor organizations who claim to represent any employees in the alleged appropriate unit.

(7) The nature of the alleged question concerning representation.

(8) The name, affiliation, if any, and address of the petitioner.

(9) Any other relevant facts.

(*b*) Such petition, when filed by an employer, shall contain the following:

(1) The name and address of the petitioner.

(2) The general nature of the petitioner's business.

(3) A brief statement setting forth that a question or controversy affecting commerce has arisen concerning the representation of employees of the petitioner in that two or more persons or labor organizations have presented to the petitioner conflicting claims that each represents a majority of the employees in the unit or units claimed to be appropriate.

(4) The names, affiliation, if any, and addresses of the persons or labor organizations making such claims of representation.

(5) A statement whether the petitioner has contracts with any of the competing labor organizations, and, if so, their expiration dates.

(6) Any other relevant facts.

SEC. 203.49 (former Art. III, sec. 3). *Investigation of petition by Regional Director; Notice of Hearing; service of notice; withdrawal of notice.*—After a petition has been filed, if no agreement such as that provided in Section 203.48 is entered into and if it appears to the Regional Director that the policies of the Act will be effectuated and that (if the petition is filed by a labor organization), there is a reasonable probability that an investigation will result in a free choice by employees of a bona fide representative, he shall institute such investigation, provided, however, that the Regional Director shall not institute an investigation on a petition filed by an employer unless it appears to the Regional Director that two or more persons or labor organizations have presented to the employer conflicting claims that each represents a majority of the employees in the bargaining unit or units claimed to be appropriate. The Regional Director shall prepare and cause to be served upon the employer and upon any known persons or labor organizations purporting to act as representatives of any employees directly affected by the investigation (all of whom shall thereupon become parties to the proceeding), and upon any employee or other person or labor organization who has filed a pending motion to intervene, a Notice of Hearing before a hearing officer at a time and place fixed therein. A copy of the petition shall be served with such Notice of Hearing. Any such Notice of Hearing may be amended or withdrawn before the hearing by the Regional Director on his own motion.

SEC. 203.57 (former Art. III, sec. 4). *Refusal to institute investigation; termination of investigation; appeals to Board from action of the Regional Director.*—(*a*) If, after a petition has been filed, it shall appear to the Regional Director that no investigation should be made, the Regional Director may decline to institute such investigation, and close the case. If, after an investigation has been instituted pursuant to Section 203.49, it shall appear to the Regional Director that further investigation should not be made, he may terminate the investigation and close the case at any time prior to issuance of an order transferring the case to the Board.

(*b*) If the Regional Director closes a case, pursuant to subsection (*a*) hereof, he shall so advise the petitioner in writing, accompanied by a simple statement of the procedural or other grounds. The petitioner may obtain a review of such action by filing a request therefor with the Board in Washington, D. C., and filing a copy of such request with the Regional Director, within ten (10) days of notification of the close of the case. The request shall contain a complete statement setting forth the facts and reasons upon which the request is based.

SEC. 203.58 (former Art. III, sec. 13). *Proceedings before Board; filing petition with Board; investigation upon motion of Board; transfer of petition and proceeding from Region to Board or to another Region; consolidation of proceedings in same Region; severance; procedure before Board in cases over which it has assumed jurisdiction.*—Whenever the Board deems it necessary in order to effectuate the purposes of the Act, it may—

(*a*) permit a petition requesting an investigation and certification to be filed with it, and may upon the filing of such petition proceed to conduct an investigation under Section 9 (c) of the Act, or direct a Regional Director, or other agent or agency to conduct such an investigation; or

(*b*) upon its own motion conduct, or direct any member, Regional Director, or other agent or agency to conduct an investigation under Section 9 (c) of the Act; or

(*c*) at any time after a petition has been filed with a Regional Director pursuant to Section 203.46, order that such petition and any proceeding which may have been instituted in respect thereto—

(1) be transferred to and continued before it, for the purpose of consolidation with any proceeding which may have been instituted by the Board, or for any other purpose; or

(2) be consolidated, for the purpose of hearing, or for any other purpose, with any other proceeding which may have been instituted in the same Region; or

(3) be transferred to and continued in any other Region, for the purpose of consolidation with any proceeding which may have been instituted in such other Region, or for any other purpose; or

(4) be severed from any other proceeding with which it may have been consolidated.

The provisions of this Subpart shall insofar as applicable, apply to proceedings conducted pursuant to subsections (*a*), (*b*), and (*c*) (1) of this Section, and the powers granted to the Regional Director in such provisions shall for the purpose of this Section be reserved to and exercised by the Board, or by the Regional Director, or other agent or agency, directed to conduct the investigation. After the transfer of any petition and any proceeding which may have been instituted in respect thereto from one Region to another pursuant to subsection (*c*) (3) of this Section, the provisions of this Subpart shall apply to such proceedings as if the petition had originally been filed in the Region to which the transfer is made.

APPENDIX D

List of illustrative cases affecting commerce, handled by New York Board.

Montgomery Ward & Co., 4 SLRB 208; 5 SLRB 441; 5 SLRB 1067; 7 SLRB 24, 25. Operates 9 mail order houses and 650 retail stores throughout United States;

Harris-Upham & Co., 9 SLRB, Case No. SE 13052, Dec. No. 3683, pg. 55, *supra*. Engages in stock brokerage business on national scale;

Metropolitan Life Ins. Co., 1 SLRB 326, 327-9; 479, 481-3. Sells life, accident and health insurance throughout U. S. and Canada;

John Hancock Mutual Life Ins. Co., 3 SLRB 98, 99; 654, 655. Sells life insurance on national scale;

Prudential Insurance Co. of America, 4 SLRB 788, 790; 9 SLRB ——, Dec. No. 3761. Sells life insurance on a national scale;

G. Schirmer, Inc., 5 SLRB 72, 73, Publishes music;

Mechanics Lumber Co., Inc., 6 SLRB 711, 712. Purchases and sells lumber;

Goldsmith & Perlman, 7 SLRB 242, 243. Manufactures ladies' hats;

R. K. O. Service Corp., et al., 7 SLRB 175, 177. Owns and controls corporations engaged in production, distribution and exhibition of motion pictures throughout U. S. and Canada. Representation proceeding concerned managers in 36 New York City motion picture theatres;

Savage Arms Corporation, 8 SLRB 322, Case No. CE-385; Dec. No. 3052, 62 NLRB 1156, Nat'l Bd. Case No. 3-R-994, 3-R-961. Manufactures war equipment, pg. 56, *supra*;

Journal-News Corp., 7 SLRB 295, 296. Publishes daily newspaper and weekly publication;

American Emblem Co., Inc., 8 SLRB 1, Case No. CE-368; Dec. No. 2923. Manufactures war equipment;

United Cigar-Whelan Stores, 9 SLRB —, Case No. SE-12059; Dec. No. 3552. Operates chain of retail cigar and drug stores on national scale;

E. A. Laboratories, Inc., 8 SLRB 49, Case No. SE-10675; Dec. No. 2953, Nat'l Bd. Case No. 2-C-6259, pg. 56, *supra;*

W. H. H. Chamberlin, Inc., 9 SLRB —, Case No. CE-446; Dec. No. 3641. Printing business;

Micamold Radio Corp., 8 SLRB 561, Case No. SE-11191; Dec. No. 3222. Manufactured war equipment;

Independent Oil Burner Corp., Case No. SE-13364. Assembly and installation of oil burners;

Emily & Herman Finder d/b/a Art Craft Character Doll Co., Case No. SE-13222. Manufactures dolls;

F. W. Woolworth & Co., Case Nos. SU-13293; SU-13294. Operates chain stores on national scale;

Sinram Bros. Inc., Case Nos. SU-12235; SE-9661. Coal and oil dealers;

Arthur Rosenberg, trading as Edro Mfg. Co. & Edward Silverstein, Case Nos. SU-12633; SE-13363. Manufactures costume and novelty jewelry;

Big Bear Food Stores, Inc., Case No. SE-11453; Dec. No. 3281. Operates 3 super-markets in New York City. A wholly owned subsidiary of Food Fair Stores, Inc., which operates 90 super-markets in Eastern Atlantic States;

Safeway Stores, Case Nos. SE-13597; SE-13605. Operates 2500 retail food stores in 26 states; 152 stores in N. Y. State;

Monroe Calculating Machine Co., Case No. SU-13598, Nat'l Bd. No. 2-C-6514. Sales, service & rental of calculating machines; subsidiary of manufacturer;

U. S. Hoffman Machine Corp., Case No. SE-13534. Manufactures & installs cleaning and laundry equipment;

Blue Ribbon Novelty Corp., Case No. SE-13583. Manufactures costume jewelry;

Fine Arts Glass Co., Case No. SU-12691. Contracts with glass manufacturers to decorate glass products;

Hearns Department Stores, Inc., 1 SLRB 318, Department stores;

James McCreery & Co., 1 SLRB 725, Department store;

Bloomingdale Bros., Inc., 1 SLRB 895, Department store;

Frederick Loeser & Co., Inc., 1 SLRB 1048, Department store;

Neile F. Towner (United Traction Co.), 1 SLRB 412, Transportation;

Iroquois Gas Corp., 1 SLRB 169. Production and distribution of gas;

Gas Consumers Association, 1 SLRB 492, California corp. with branch and business offices in N. Y. City. Installs gas regulators, services gas equipment;

Williamsburgh Power Plant Corp., 1 SLRB 653, Production of power for transportation;

International Railway Co., 2 SLRB 250, Transportation;

Lord & Taylor, 2 SLRB 191, Department store;

Arnold Constable & Co., Inc., 2 SLRB 698, Department store;

Gimbel Bros., Inc., 2 SLRB 829, Department store;

Triboro Coach Corporation, 2 SLRB 739, Transportation;

Stern Bros., 2 SLRB 351, Department store;

United Traction Co., 3 SLRB 253, Transportation;

Triangle Bus Corp., 3 SLRB 285, Transportation;

Long Beach Bus Co., Inc., 3 SLRB 455, Transportation;

Jamaica Buses, Inc., 3 SLRB 513, Transportation;
Bee Line, Inc., 3 SLRB 900, Transportation;
Stern Bros., 3 SLRB 607, Department store;
Terminal System, Inc., 3 SLRB 322, Transportation;
Trustee of United Traction Co., et al., 3 SLRB 253, Transportation;
B. Gertz, Inc., 4 SLRB 931, Department store;
Lord & Taylor, 4 SLRB 270, Department store;
Queens Borough Gas & Electric Co., 5 SLRB 931. Production, transportation and distribution of gas and electricity;
Bee Line, Inc., 6 SLRB 686, Transportation;
Lockport Bus Lines, Inc., 6 SLRB 899, Transportation;
Long Island Lighting Co., 7 SLRB 37, Manufacture and distribution of gas and electricity.

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Nos. 55, 76

In the Supreme Court of the United States

OCTOBER TERM, 1946

BETHLEHEM STEEL COMPANY, ET AL., APPELLANTS

v.

NEW YORK STATE LABOR RELATIONS BOARD

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

THE ALLEGHENY LUDLUM STEEL CORPORATION, APPELLANT

v.

WILLIAM J. KELLEY, ET AL., CONSTITUTING THE STATE LABOR RELATIONS BOARD OF THE STATE OF NEW YORK

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF NEW YORK FOR THE COUNTY OF CHAUTAUQUA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

INDEX

	Page
Opinions below	1
Jurisdiction	3
Question presented	3
Statutes involved	3
Statement	4
Summary of argument	17
Argument:	
I. The National Labor Relations Act supersedes the New York statute as it has been applied in these cases	23
A. The State Board may not enforce a policy conflicting with that applied by the National Board	24
B. The Federal statute supersedes the State statute even when the policies being applied under them are the same	38
1. The theory of supersedure and its application to these cases	39
2. The effect of applying State laws to industries controlled under the National Act	49
3. The language and history of the National Act	58
II. The practical problem confronting the Board	66
A. The cases which the National Board does not handle	66
B. The understanding with the New York Board	71
Conclusion	77
Appendix A: Pertinent Provisions of the National Labor Relations Act	78
Appendix B: Pertinent Provisions of the New York Labor Relations Act	85
Appendix C: Documents Indicating Understanding Between the New York and the National Labor Relations Boards	91

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CITATIONS

Cases:

	Page
Adams Express Co. v. *Croninger*, 226 U. S. 491	39, 44
Aerovox Corp., Matter of, 10 N. L. R. B. 652	27
A. H. Bull Steamship Co., Matter of, 36 N. L. R. B. 99	27
Alabama and V. Ry. v. *Jackson and E. Ry.*, 271 U. S. 244	37, 39, 45
Allegheny Ludlum Steel Corporation v. *Kelley, et al.*, 184 Misc. 47	16
Allegheny Ludlum Steel Corp., Matter of, Case No. III-R-411 (unreported)	7
Allen-Bradley Local v. *Wisconsin Employment Relations Board*, 315 U. S. 740	38, 64
Amalgamated Utility Workers v. *Consolidated Edison Co.*, 309 U. S. 261	58, 61
American Can Co., Matter of, 13 N. L. R. B. 1252	32
American Federation of Labor v. *McAdory, et al.*, 325 U. S. 450	50
American Potash & Chemical Corp., Matter of, 3 N. L. R. B. 140, enforced, 98 F. 2d 488, certiorari denied, 306 U. S. 643	25
A. S. Abell Co., Matter of, 54 N. L. R. B. 62	27
Atlantic Greyhound Corp., Matter of, 7 N. L. R. B. 1189	25
Available Truck Co., Matter of, 2 N. L. R. B. (old) 195	26
Bendix Products Corp., Matter of, 15 N. L. R. B. 965	32
Bethlehem Steel Corp., Matter of, 30 N. L. R. B. 1006, 32 N. L. R. B. 264	7
Bethlehem Steel Corp., Matter of, 47 N. L. R. B. 1330	8
Bethlehem Steel Corp., Matter of, 52 N. L. R. B. 1217	8
Bethlehem Steel Corp., Matter of, 55 N. L. R. B. 658	8
Birmingham Post Co. v. *National Labor Relations Board*, 140 F. 2d 638	28
Black Diamond Steamship Corp., Matter of, 2 N. L. R. B. 241	26
Boeing Aircraft Company, Matter of, 51 N. L. R. B. 67	6
Campbell Machine Co., Matter of, 3 N. L. R. B. 793	27
Carnegie-Illinois Steel Corp., Matter of, 37 N. L. R. B. 19	27
Celotex Corp., Matter of, 66 N. L. R. B. 744	27
Charleston & Car. R. R. v. *Varnville Co.*, 237 U. S. 597	39, 46
Cincinnati Daily Newspaper Publishers' Assn., Matter of, 55 N. L. R. B. 571	27
Cities Service Oil Co., Matter of, 10 N. L. R. B. 954	27
Cleveland, City of v. *Piskura*, 145 Ohio St. 144, 60 N. E. 2d 919	41
Climax Engineering Co., Matter of, 66 N. L. R. B. 1359	30
Cloverleaf Butter Co. v. *Patterson*, 315 U. S. 148	37, 39, 44, 47
Condenser Corp., Matter of, 22 N. L. R. B. 347, enforced, 128 F. 2d 67	26

Cases—Continued.

	Page
Consolidated Edison Co. v. *National Labor Relations Board*, 305 U. S. 197	69
Consumers Power Co., Matter of, 9 N. L. R. B. 742	28
Coos Bay Lumber Co., Matter of, 62 N. L. R. B. 93	28
Country Life Press Corp., Matter of, 51 N. L. R. B. 1362	27
Creamery Package Mfg. Co., Matter of, N. L. R. B. Case No. XII–R–341, R. 2705	52
Cullom & Ghertner Co., Matter of, 14 N. L. R. B. 270	27
Dade Drydock Corp., Matter of, 58 N. L. R. B. 833	33
Darweger v. *Staats*, 267 N. Y. 290	42
Davega City Radio, Inc. v. *State Labor Relations Board*, 281 N. Y. 13; 22 E. E. 2d 145	16, 62, 71
Dravo Corp., Matter of, 39 N. L. R. B. 846	27
Eagle-Picher Mining & Smelting Co., Matter of, 16 N. L. R. B. 727, enforced, 119 F. 2d 903	26
Eishholz v. *Public Service Commission*, 306 U. S. 268	36, 45
Eppinger & Russell Co., Matter of, 56 N. L. R. B. 1259	61
Erie R. R. Co. v. *New York*, 233 U. S. 671	44
Evinrude Motors, Matter of, 66 N. L. R. B. 1142	53
Federal Mogul Corp., Matter of, 66 N. L. R. B. 532	27
Fox River Valley Knitting Co., Matter of, N. L. R. B. Case No. XII–C–742	53
Fruehauf Trailer Co., Matter of, 1 N. L. R. B. 68, enforced, 301 U. S. 49	25
General Motors Corporation, Matter of, 51 N. L. R. B. 457	6
Geuder, Paeschke & Frey Co., Matter of, 2 N. L. R. B. (old) 393	26
Gilvary v. *Cuyahoga Valley Ry. Co.*, 292 U. S. 57	42, 46
Godchaux Sugars, Inc., Matter of, 44 N. L. R. B. 874	4
Golden Turkey Mining Co., Matter of, 34 N. L. R. B. 760	26
Grace Line, Inc., Matter of, 2 N. L. R. B. 369	26
Harris Hub, Bed & Spring Co., Matter of, 13 N. L. R. B. 1236	28
Hazel-Atlas Glass Co., Matter of, 34 N. L. R. B. 346, enforced, 127 F. 2d 109	26
H. J. Heinz Co. v. *National Labor Relations Board*, 311 U. S. 514	28
Hill v. *Florida*, 325 U. S. 538	38, 46, 61
Hines v. *Davidowitz*, 312 U. S. 52	38, 39, 45
Ill. Cent. R. R. Co. v. *Public Utilities Comm.*, 245 U. S. 493	36, 45
International Mercantile Marine Co., Matter of, 1 N. L. R. B. 384	26
J. C. Sanders Cotton Mill Co., Matter of, 31 N. L. R. B. 298	28
Jones & Laughlin Steel Corp., Matter of, 37 N. L. R. B. 366	27
Jones & Laughlin Steel Corp., Matter of, 66 N. L. R. B. 386	11, 29
Jones & Laughlin Steel Corp. v. *National Labor Relations Board*, 54 N. L. R. B. 679, enforced, 146 F. 2d 833, certiorari denied, 325 U. S. 886	26, 27, 28

Cases—Continued

	Page
Jones Lumber Co., Matter of, 3 N. L. R. B. 855	28
Kelly v. *Washington*, 302 U. S. 1	44
Kelsey-Hayes Wheel Co., Matter of, 66 N. L. R. B. 570	27
L. A. Young Spring & Wire Corporation, Matter of, 65 N. L. R. B. 298	11
Lasswell, In re, 1 Cal. App. 2d 183	42
Lichtenstein, Leo, Matter of, 55 N. L. R. B. 1429	27
Luckenbach Steamship Co., Matter of, 2 N. L. R. B. 181	33
Luxuray, Inc., Matter of, 16 N. L. R. B. 37, enforced, 123 F. 2d 106	26
Lykes Bros. Steamship Co., Matter of, 2 N. L. R. B. 102	26
Maryland Drydock Company, Matter of, 49 N. L. R. B. 733	5, 6, 27, 29, 30, 31, 35
Merrimack Mfg. Co., Matter of, 9 N. L. R. B. 173	27
Mintz v. *Baldwin*, 289 U. S. 346	36, 45
Missouri K. & T. R. Co. v. *Harris*, 234 U. S. 412	46
Missouri Pacific R. Co. v. *Porter*, 273 U. S. 341	37, 39, 45, 47
Murray Corporation of America, Matter of, 51 N. L. R. B. 94	6
Napier v. *Atlantic Coast Line Co.*, 272 U. S. 605	37, 39, 45
National Labor Relations Board v. *Baltimore Transit Co.*, 140 F. 2d 51, certiorari denied, 321 U. S. 795	68
National Labor Relations Board v. *Electric Vacuum Cleaner Co.*, 315 U. S. 685	65
National Labor Relations Board v. *Hearst Publications*, 322 U. S. 111	44
National Labor Relations Board v. *Moench Tanning Co.*, 121 F. 2d 951	28
National Labor Relations Board v. *Skinner & Kennedy Co.*, 113 F. 2d 667	28
New York Central R. R. Co. v. *Winfield*, 244 U. S. 147	44
New York & Cuba Mail Steamship Co., Matter of, 2 N. L. R. B. 595	27
New York & Cuba Mail Steamship Co., Matter of, 9 N. L. R. B. 51	27
New York State Labor Relations Board v. *Metropolitan Life Ins. Co.*, 183 N. Y. Misc. 1064, 52 N. Y. S. 2d 590, affirmed, 269 App. Div. 934, 58 N. Y. S. 2d 343, affirmed 295 N. Y. 839, 66 N. E. 2d 853	32
Northern Pacific Ry. Co. v. *Washington*, 222 U. S. 370	37, 45
Northern States Power Co., Matter of, 37 N. L. R. B. 991	61
Northwestern Bell Telephone Co. v. *Nebraska State Ry. Commission*, 297 U. S. 471	36, 45
Ocean Steamship Co., Matter of, 2 N. L. R. B. 588	26
Oregon-Washington R. & Nav. Co. v. *Washington*, 270 U. S. 87	37, 39, 45

Cases—Continued Page

Packard Motor Car Company, Matter of, 61 N. L. R. B. 4, 64 N. L. R. B. 1212, enforced Aug. 12, 1946, 18 L. R. R. M. 2268 ..... 5, 14, 29, 30
Pennsylvania-Dixie Cement Corp., Matter of, 2 N. L. R. B. (old) 417 26
People v. *Lewis*, 295 N. Y. 42, 64 N. E. 2d 702 41
People v. *Mailman*, 293 N. Y. 887, 59 N. E. 2d 790, affirming 49 N. Y. S. 2d 733, 182 N. Y. Misc. 870 41
People v. *Sell*, 310 Mich. 305, 17 N. W. 2d 193 41
Pittsburgh Plate Glass Co., v. *National Labor Relations Board*, 313 U. S. 146 51
Polish National Alliance v. *National Labor Relations Board*, 322 U. S. 643 66
Prettyman, Horace, Matter of, 12 N. L. R. B. 640, reversed, 117 F. 2d 786 25
Proximity Mfg. Co., Matter of, 54 N. L. R. B. 1179 27
Prudential Ins. Co. v. *Benjamin*, decided June 3, 1946, No. 707, 1945 Term 40
Rapinwax Paper Co., Matter of, 56 N. L. R. B. 1774 27
Remington Rand, Inc., Matter of, 2 N. L. R. B. 626, enforced, 94 F. 2d 862, certiorari denied, 304 U. S. 567 25
Richmond Hosiery Mills, Matter of, 8 N. L. R. B. 1073 28
Richter's Bakery, Matter of, 46 N. L. R. B. 47, enforced, 140 F. 2d 870, certiorari denied, 322 U. S. 754 26
Rock River Woolen Mills, Matter of, 18 N. L. R. B. 828 61
Rosenhirsch Co., Matter of, 38 N. L. R. B. 619 33
Savage v. *Jones*, 225 U. S. 501 ..... 44, 46
Seas Shipping Co., Matter of, 8 N. L. R. B. 422 27
Second Employers' Liability Cases, 223 U. S. 1 39
Service Printers, Inc., Matter of, 54 N. L. R. B. 1082 27
Shell Oil Co., Matter of, 34 N. L. R. B. 866 26
Skinner & Kennedy Co., Matter of, 13 N. L. R. B. 1186, enforced, 113 F. 2d 667 25
Smith v. *Alphin*, 150 N. C. 425, 64 S. E. 210 42
Soss Mfg. Co.; Matter of, 56 N. L. R. B. 348 ..... 26, 31
Southern Ry. Co. v. *R. R. Comm. of Indiana*, 236 U. S. 439 ..... 39, 47
Standard Oil Co., Matter of, 63 N. L. R. B. 990 33
Standard Oil of New Jersey, Matter of, 8 N. L. R. B. 936 27
Star Publishing Co., Matter of, 4 N. L. R. B. 498, enforced, 97 F. 2d 465 25
Swayne & Hoyt, Ltd., Matter of, 2 N. L. R. B. 282 26
Texas Co., The., Matter of, 23 N. L. R. B. 1022 27
Tide Water Associated Oil Co., Matter of, 9 N. L. R. B. 823 27
Times-Mirror Co., Matter of, 54 N. L. R. B. 787 27
Trustees of Wisconsin State Federation of Labor v. *Simplex Shoe Mfg. Co.*, 215 Wis. 623, 256 N. W. 56 61

Cases—Continued	Page
Twin City Milk Producers Ass'n., Matter of, 61 N. L. R. B. 69	61
Union Bag & Paper Corp., Matter of, 52 N. L. R. B. 591	27
Union Collieries Coal Company, Matter of, 41 N. L. R. B. 961	4, 29
United Office & Professional Workers v. *Smiley*, 18 L. R. R. M. 2356	33, 53
Utah Copper Co., Matter of, 35 N. L. R. B. 1295	32
Warfield Co., Matter of, 6 N. L. R. B. 58	25
Welch Co. v. *New Hampshire*, 306 U. S. 79	36, 45
W. F. Hall Printing Co., Matter of, 51 N. L. R. B. 640	27
Whiting Mead Co., Matter of, 45 N. L. R. B. 987, enforced, 148 F. 2d 817	26, 31
Willys-Overland Motors, Matter of, 9 N. L. R. B. 924	28
Wilson-Hurd Mfg. Co., Inc., Matter of, 68 N. L. R. B. 853	53
Wisc. Emp. Rel. Bd., Case 1, No. 432E–149	52
Wisc. Emp. R. B. Case III, No. 348 E–117	51
Wisconsin L. R. B. v. *Rueping Leather Co.*, 228 Wis. 473, 279 N. W. 673	63, 71
Constitution and Federal Statutes:	
Constitution of the United States:	
Art. I, Sec. 8	17
Art. VI, Clause 2	17
Administrative Procedure Act (Pub. No. 404, 79th Cong., 2d Sess., § 6 (a)	70
Fair Labor Standards Act, Sec. 18, 52 Stat. 1060, 1069, 29 U. S. C. Sec. 218	66
National Industrial Recovery Act, 48 Stat. 195, Sec. 7 (a)	26
National Labor Relations Act (Act of July 5, 1935, c. 372, 49 Stat. 449, 29 U. S. C., Sec. 151, *et seq.*):	
Sec. 1	78
Sec. 2 (2)	28, 79
Sec. 2 (3)	4, 25, 28, 31, 80
Sec. 2 (6)	80
Sec. 2 (7)	80
Sec. 4 (a)	63, 81
Sec. 7	25, 81
Sec. 8	81
Sec. 8 (3)	25, 31, 64
Sec. 9	82
Sec. 9 (b)	4, 32, 50
Sec. 9 (c)	32
Sec. 10 (a)	21, 22, 57, 60, 62, 63, 69, 83
Sec. 14	83
Securities Act of 1933, Sec. 18, 48 Stat. 74, 85, 15 U. S. C. Sec. 77r	65

Constitution and Federal Statutes—Continued Page

Securities Exchange Act of 1934, Sec. 28, 48 Stat. 881, 903, 15 U. S. C. Sec. 78bb 65

State Statutes:

Act of Alabama, Sec. 16, 1943, No. 298, p. 253, Code 1943, Title 26, Sec. 376, *et seq.*, ... 50

California Stat. 1945, p. 164 41

Connecticut Stats. (1945 Supp.), Ch. 279, Sec. 938 h (2) 50

Minnesota Laws, Sec. 16 (b), 1939, Ch. 440, Mason's Minnesota Statutes, Supp. 1940, Ch. 23, Sec. 4254–36 (b) 50

Minnesota Stats. (Mason, 1940 Supp.), Ch. 23, Sec. 4254–36 (b) 50

New York City Administrative Code, Secs. U41–4.0, U41–5.0 (Local Laws 34 and 35, 1945) 41

New York State Laws of 1937, Chapter 443, as amended by New York Laws of 1942, Chapter 518, 30 McKinney's Consolidated Laws of New York, §§ 700–715 ..... 50, 85

New York Laws, 1942, chap. 445, 544, Sec. 7 (6) 41

Pennsylvania Stats. Ann. (Purdon, 1945), Title 43, Sec. 211.7 (b) 50

Rhode Island Laws (1941), Ch. 1066, Sec. 6 (2) 50

Rhode Island Laws, 1943, p. 51 41

Wisconsin Laws, 1943, c. 550 41

Wisconsin Stats. (1933), §§ 268.18, 133.07 60

Wisconsin Stats. (1939), Ch. 57, Sec. 111.02 (b) 50

Miscellaneous:

Clark, *State Industrial Recovery Acts and State Codes*, 20 A. B. A. J. 343 (1934) 42

Comment, 33 Mich. L. Rev. 597 (1934) 41, 42

601–603 42

Hearings, Senate Committee on Education and Labor, on H. R. 4908, 79th Cong., 2d sess., p. 290 55

Higgins, *A New Province for Law and Order*, 34 Harv. L. Rev. 105 (1920) 54

H. Rep. No. 1147, 74th Cong., 1st Sess.:

P. 9 59

Pp. 19–20 64

Letter from Robert B. Watts, General Counsel, National Labor Relations Board, to Charles Fahy, Solicitor General, dated February 7, 1942 52

Mayers, *A Handbook of N. R. A.* (2d Ed., 1934, pp. 397, *et seq.*) 41

National Labor Relations Board:

Third Annual Report (1939):

Pp. 134–138 33

Pp. 160–163 32

Pp. 167–174 50

Fifth Annual Report (1941), pp. 65–66 32

Sixth Annual Report (1942), pp. 55–56 33

Miscellaneous—Continued Page
Eighth Annual Report (1944), pp. 53–55 50
Ninth Annual Report (1944), pp. 25–28 33
Tenth Annual Report (1946):
Pp. 16–17 33
Pp. 28–30 32
National Labor Relations Board, Rules and Regulations, Series 4, effective Sept. 11, 1946, sections 203.15, 203.57, 11 F. R. No. 177A, pp. 607, 613 70
New York State Labor Relations Board, *Matter of Harris, et al.*, Decision No. 3683, August 30, 1946, 18 L. R. R. M. 1384 75
New York State War Council Resolution of April 28, 1943 41
Note, 34 Col. L. Rev. 1077 (1934) 41
S. Rep. 573, 74th Cong., 1st Sess.:
Pp. 4–5 59
Pp. 11–12 65
P. 15 60
P. 16 64
1 U. S. Law Week 211 (1933), 911 (1934) 41

In the Supreme Court of the United States

OCTOBER TERM, 1946

No. 55

BETHLEHEM STEEL COMPANY, ET AL., APPELLANTS

v.

NEW YORK STATE LABOR RELATIONS BOARD

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

No. 76

THE ALLEGHENY LUDLUM STEEL CORPORATION, APPELLANT

v.

WILLIAM J. KELLEY, ET AL., CONSTITUTING THE STATE LABOR RELATIONS BOARD OF THE STATE OF NEW YORK

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF NEW YORK FOR THE COUNTY OF CHAUTAUQUA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

OPINIONS BELOW

In the *Bethlehem* case, the memorandum opinion of Mr. Justice Batt of the Supreme Court of

the State of New York for the County of Erie (No. 55, R. 58) is unreported. The Appellate Division of the Supreme Court of the State of New York for the Fourth Department and the Court of Appeals of the State of New York both affirmed without opinion (No. 55, R. 60–61; 61–64). 269 App. Div. 805, 295 N. Y. 601. In the *Allegheny* case, the opinion of Mr. Justice Hinkley of the Supreme Court of the State of New York for the County of Chautauqua (No. 76, R. 59–63) is reported in 184 Misc. 47. The Appellate Division of the Supreme Court of the State of New York for the Fourth Department and the Court of Appeals of the State of New York both affirmed without opinion (No. 76, R. 65–66; 67–68). 269 App. Div. 805, 295 N. Y. 607.

The Decision and Direction of Election of the New York State Labor Relations Board in *Matter of Allegheny Ludlum Steel Corporation and Foreman's Association of America, etc.*, Case No. WE–373, Decision No. 2751, involved in the *Allegheny* case (No. 76, R. 20–38), is reported in 7 N. Y. S. L. R. B. 103. The subsequent Decision and Order of the State Board in *Matter of Allegheny Ludlum Steel Corporation and Foreman's Association of America, etc.*, Case No. WU–404, Decision No. 3519, issued on May 29, 1946, is not yet officially reported.

JURISDICTION

The jurisdiction of this Court is invoked under Section 237 (a) of the Judicial Code.

QUESTION PRESENTED

This brief is filed in response to the request of this Court to the Solicitor General.[1] It is limited to discussion of the following question:

Whether, when the National Labor Relations Act as interpreted by the National Board governs the obligation of employers subject to its jurisdiction to bargain with the representatives of supervisory employees, a State may attempt to regulate the same obligation of an employer predominantly engaged in interstate commerce when the State's policy is (a) inconsistent, and (b) consistent with that of the National Board.

STATUTES INVOLVED

The statutes involved are the New York State Labor Relations Act (New York Laws of 1937, Chapter 443, as amended by New York Laws of 1942, Chapter 518, 30 McKinney's Consolidated

[1] The position taken by the Government in this brief reflects the views of the National Labor Relations Board. However, Chairman Paul M. Herzog of the National Labor Relations Board, having formerly been Chairman of the New York State Labor Relations Board, has refrained from participating in the consideration or formulation of the views of the National Labor Relations Board in these cases.

Laws of New York §§ 700–715), herein sometimes called the State Act, and the National Labor Relations Act (Act of July 5, 1935, c. 372, 49 Stat. 449, 29 U. S. C., Sec. 151, *et seq.*), herein sometimes called the National Act. The pertinent provisions of each statute are attached as Appendices A and B to this brief, *infra*, pp. 78–90.

STATEMENT

The critical facts which give rise to the question here presented may be summarized briefly as follows:

Throughout its history the National Labor Relations Board has consistently held that supervisory employees (unlike agricultural laborers, who are expressly excluded), are "employees" within the meaning of Section 2 (3) of the National Act, and that delineation of the collective bargaining rights of supervisory employees is committed by Congress to the Board (No. 76, R. 58).[2]

Prior to May 1943, the National Board also held that units of supervisory employees were appropriate for the purposes of collective bargaining within the meaning of Section 9 (b) of the National Act,[3] and certified representatives selected by employees in such units.[4] In *Matter of*

[2] Cases cited notes 8, 9, pp. 25–28, *infra*.

[3] *Matter of Union Collieries Coal Company*, 41 N. L. R. B. 961.

[4] *Matter of Godchaux Sugars, Inc.*, 44 N. L. R. B. 874.

Maryland Drydock Company, 49 N. L. R. B. 733, decided May 11, 1943, the Board reconsidered the question of the appropriateness of units of supervisory employees and, with Chairman Millis dissenting, concluded that (p. 740):

> the benefits which supervisory employees might achieve through being certified as collective bargaining units would be outweighed not only by the dangers inherent in the commingling of management and employee functions, but also in its possible restrictive effect upon the organizational freedom of rank and file employees.

It was the opinion of the majority of the Board that (p. 741):

> in the present stage of industrial administration and employee self-organization [in mass-production industry], the establishment of bargaining units composed of supervisors exercising substantial managerial authority will impede the processes of collective bargaining, disrupt established managerial and production techniques, and militate against effectuation of the policies of the Act.

Between the date of this Decision, and March 26, 1945, when it was overruled in *Matter of Packard Motor Car Company*, 61 N. L. R. B. 4, the Board dismissed all petitions filed with it on behalf of units of supervisory employees in mass production industries, on the ground that certification of representatives for such units would obstruct

rather than further effectuation of the policies of the National Act.[5]

During this period, the New York State Labor Relations Board, administering provisions of the State Act largely identical with those involved in the National Board's construction of the National Act, followed the contrary policy. Thus, the State Board consistently found that units of supervisory employees were appropriate for purposes of collective bargaining; it certified representatives selected by such units; and it ordered employers to bargain collectively with the certified representatives (No. 76, R. 35). The instant cases arise out of attempts by the State Board to apply its policies to supervisory employees of employers who are predominantly engaged in interstate commerce and clearly subject to the National Act.

On December 30, 1943, subsequent to the *Maryland Drydock* decision, the Foreman's Association of America, Chapter No. 58, filed a petition with the State Board requesting the State Board to investigate a question concerning the representation of supervisory employees employed by the Allegheny Ludlum Steel Corporation at its Dunkirk, New York, plant, and to certify the Association as exclusive bargaining representative of a unit composed of those supervisory

[5] *Matter of Boeing Aircraft Company*, 51 N. L. R. B. 67; *Matter of Murray Corporation of America*, 51 N. L. R. B. 94; *Matter of General Motors Corporation*, 51 N. L. R. B. 457.

employees (No. 76, R. 9, 15). On October 20, 1944, the Foreman's Association of America, Chapter No. 50, filed a similar petition with the State Board involving supervisory employees employed by the Bethlehem Steel Company at its Lackawanna, New York, plant (No. 55, R. 20–21, 44–45).

Prior to the filing of these petitions with the State Board, petitions for investigation of representatives selected by non-supervisory employees at both of these plants had been filed with the National Board. In the course of investigation of those petitions, the National Board had found that Allegheny Ludlum Steel Corporation, at its Dunkirk, New York, plant, and Bethlehem Steel Company, at its Lackawanna, New York, plant, were engaged in commerce within the meaning of the National Act, and were subject to the National Act (No. 55, R. 50–52; No. 76, R. 11, 16, 29). The National Board had investigated the questions concerning representation presented by these petitions and had certified representatives selected by various appropriate units of non-supervisory employees at both plants (*ibid.*).[6]

[6] *Matter of Allegheny Ludlum Steel Corp.*, Case No. III-R-411, unreported (United Steelworkers of America, C. I. O., certified as exclusive representative of production and maintenance employees at Dunkirk plant, on June 29, 1942); *Matter of Bethlehem Steel Corp.*, 30 N. L. R. B. 1006, 32 N. L. R. B. 264 (Steel Workers Organizing Committee, C. I. O., certified as exclusive representative of production and maintenance employees at Lackawanna plant, on June 2,

In the course of investigating the petitions filed with it by the Foreman's Association, the State Board sought information from the Regional Director for the Third Region (Buffalo, New York) of the National Board, as to whether petitions concerning these employees had been filed with the National Board, and what action the National Board would take if such petitions were filed with the National Board. The Regional Director informed the State Board that no such petitions had been filed with the National Board and that, if petitions had been filed, the National Board, following its general policy, would have dismissed the petitions on the ground that units composed of supervisory employees are not appropriate for purposes of collective bargaining (No. 76, R. 45; No. 55, R. 56, 57). The Regional Director explicitly stated that this type of action by the National Board was not to be construed as a refusal to exercise jurisdiction, but rather as an assertion of jurisdiction resulting in dismissal of the case on the merits (No. 55, R. 56).

1941); *Matter of Bethlehem Steel Corp.*, 47 N. L. R. B. 1330 (American Federation of Labor certified as exclusive representative of plant protection employees at Lackawanna plant, on March 31, 1943); *Matter of Bethlehem Steel Corp.*, 52 N. L. R. B. 1217 (United Steelworkers of America, C. I. O., certified as exclusive representative of employees in the Order Department at the Lackawanna plant, on November 15, 1943); *Matter of Bethlehem Steel Corp.*, 55 N. L. R. B. 658 (American Federation of Labor certified as exclusive representative of employees in the Fire Department at the Lackawanna plant, on April 18, 1944).

Proceedings in the Allegheny case.—On February 23 and 24, 1944, the State Board conducted a hearing, and on May 24, 1944, issued its Decision and Direction of Election in *Matter of Allegheny Ludlum Steel Corporation and Foreman's Association of America, etc.*, Case No. WE–373 (No. 76, R. 9, 15–16, 20–38). In its Decision the State Board denied Allegheny's motion, made at the close of the hearing, to dismiss the Association's petition on jurisdictional grounds (No. 76, R. 9, 13, 21, 26–34). The State Board, relying on the fact that no petition involving these supervisors had been filed with the National Board, asserted that the National Board had not "taken jurisdiction of the particular question or controversy involved" in the case (No. 76, R. 29, 37). The State Board held that since the National Board would not order Allegheny not to bargain with the Association as the representative of the supervisory employees, an order by the State Board requiring Allegheny so to bargain would not be in conflict with any action of the National Board (No. 76, R. 29, 31–32). The State Board further held that the contrary findings of the National Board and the State Board on the question of whether supervisory employees could constitute an appropriate bargaining unit presented no conflict in a Constitutional sense because these findings related purely to a question of fact and "the possibility of different fact findings on the

same record by the National and the State Boards does not create a conflict of jurisdiction between them" (No. 76, R. 30–31). The State Board also stated that since the National Board did not hold bargaining units of foremen appropriate within the meaning of the National Act, and did not require employers to bargain with representatives selected by units of foremen, "the situation is exactly the same as if the National Labor Relations Act exempted foremen, like agricultural workers, from its coverage" (No. 76, R. 30). The State Board concluded that there was thus no federal regulation in the field and that "the State is, at the least, free to make its own regulations to govern the relationship between foremen and their employers located within the State" (*ibid.*).

On the merits, the State Board held that the unit of supervisory employees named in the Association's petition was appropriate within the meaning of Section 705, subdivision 2, of the State Act (No. 76, R. 34–36, 37–38), and that a question existed concerning the representation of the employees in this unit (No. 76, R. 33–34, 37); it directed that the question be resolved by an election by secret ballot (No. 76, R. 36, 38). On June 30, 1944, the State Board, following an election conducted pursuant to its Direction, certified the Association as exclusive representative of the employees in the unit which it had previously found appropriate (No. 76, R. 47, 54). On May

29, 1946, after the National Board had reversed the rule established in the *Maryland Drydock* case,[7] the State Board issued its Decision and Order in *Matter of Allegheny Ludlum Steel Corporation and Foreman's Association of America, etc.*, Case No. WU–404, finding that the Company had violated Section 704, subdivision 6, of the State Act by refusing to bargain with the Association, and ordered the Company upon request to bargain collectively with the certified representative.

While the representation proceedings which culminated in certification of the Association were pending before the State Board, Allegheny initiated this action on April 14, 1944, in the Supreme Court of the State of New York for the County of Chautauqua, requesting a declaratory judgment decreeing that under Article I, Section 8, of the Constitution of the United States, the State Board was without jurisdiction to determine questions concerning the representation of Allegheny's supervisory employees or to order Allegheny to bargain with a representative selected by such employees, and restraining and enjoining the State Board from taking any such action (No. 76, R. 7–14, 41). In its complaint, Allegheny alleged, *inter alia*, that of

[7] *Matter of Packard Motor Car Company*, 61 N. L. R. B. 4, 64 N. L. R. B. 1212; *Matter of L. A. Young Spring & Wire Corporation*, 65 N. L. R. B., 298; *Matter of Jones and Laughlin Steel Corp.*, 66 N. L. R. B. 386.

the products produced at its Dunkirk plant, approximately 95 percent in value was shipped to points outside the State of New York, and that of the raw materials used in the Dunkirk plant, approximately 86 percent in value was shipped from points outside the State of New York (No. 76, R. 10); that it was engaged, at its Dunkirk plant, in commerce within the meaning of the National Act (No. 76, R. 10–11); that the National Board was vested with exclusive power to determine appropriate bargaining units among the employees at that plant (*id.*); that the National Board had asserted jurisdiction over controversies concerning the representation of supervisory employees (*id.*); and that action by the State Board in certifying representatives selected by Allegheny's supervisory employees and in requiring Allegheny to bargain with such representatives, would conflict with the National Act as construed by the National Board (No. 76, R. 11–13). On May 24, 1944, the State Board served its answer praying that the complaint be dismissed (No. 76, R. 14–39, 41), and on June 2, 1944, filed a motion for judgment on the pleadings and for summary judgment (No. 76, R. 40). In its answer and in an affidavit supporting the motion for summary judgment, the State Board asserted, *inter alia,* that since no petition involving Allegheny's supervisory employees at the Dunkirk plant had been filed with the National Board, and since if such a petition had been filed

it would have been dismissed by the National Board, the National Board had not taken jurisdiction of the question involved in the State Board proceedings, and therefore the Constitution of the United States did not preclude the State Board from acting (No. 76, R. 19–20, 41–42, 45–46). Allegheny filed an affidavit in opposition to the motion (No. 76, R. 47–53), alleging, *inter alia*, that the National Board had determined generally, and in specific cases, that a unit of supervisory employees would not constitute a unit appropriate for purposes of collective bargaining, and that action by the State Board based on findings that such a unit is appropriate would conflict with the holdings and policy of the National Board (No. 76, R. 49–50, 52). The State Board filed a reply affidavit (No. 76, R. 53–57), asserting, *inter alia*, that the National Board would issue no order requiring Allegheny not to bargain with the representative selected by its supervisory employees and hence an order by the State Board requiring Allegheny so to bargain would not conflict with any order of the National Board (No. 76, R. 53–54, 56–57).

On July 27, 1944, the court issued its opinion holding that although Allegheny "is almost exclusively engaged in interstate commerce," the State Board retained jurisdiction to act because the National Board "has taken no steps to accept jurisdiction" (No. 76, R. 60–61). The court further held that although there was a "sharp

conflict between the policy" of the National Board and the State Board (No. 76, R. 61), the policy of the National Board amounted to no more than a refusal to exercise its authority, and that in the absence of "any intent upon the part of Congress [in the National Act] to cover the whole field of employer and employee relations in industrial plants engaged in interstate commerce * * * it cannot be said that the failure of the Federal Board to exercise its full power is in effect a controlling administrative ruling that no further regulation by either Federal or State government is proper or needful" (No. 76, R. 62–63). The court, therefore, granted the State Board's motion to dismiss the complaint (No. 76, R. 63), and on September 26, 1944, entered its order and judgment accordingly (No. 76, R. 2–6).

Allegheny appealed to the Appellate Division of the Supreme Court of the State of New York for the Fourth Department (No. 76, R. 1–2), which affirmed the judgment below without opinion on May 1, 1945 (No. 76, R. 64–66). Allegheny thereupon appealed to the Court of Appeals of the State of New York, "relying upon questions herein raised involving the construction of the Constitution of the United States of America" (No. 76, R. 63–64). On November 30, 1945, the Court of Appeals affirmed the judgment of the Appellate Division without opinion and remitted the case to the Supreme Court of the State of New

York for further proceedings (No. 76, R. 67–68). The order and judgment of the Court of Appeals was made the order and judgment of the Supreme Court of the State of New York for the County of Chautauqua on December 26, 1945, and judgment was entered thereon in the latter court on December 28, 1945 (No. 76, R. 68–71).

Proceedings in the Bethlehem case.—On November 9, 10, 11, 24, and 25, 1944, the State Board, over Bethlehem's objection on jurisdictional and constitutional grounds (No. 55, R. 49–50), conducted a hearing in *Matter of Bethlehem Steel Company and Foreman's Association of America, etc.,* Case No. WE–379 (No. 55, R. 20–22, 37–38, 46). This hearing was held on the Association's petition requesting the State Board to conduct an investigation and certify the Association as exclusive bargaining representative of a unit composed of supervisory employees employed by Bethlehem at its Lackawanna, New York, plant (No. 55, R. 21, 44–45). On November 15, 1944, the State Board issued a subpoena *duces tecum* directing Bethlehem to produce at the hearing certain documents allegedly bearing upon the supervisory status of the employees asserted in the Association's petition to constitute an appropriate unit, and also issued certain subpoenas *ad testificandum* directed to certain officials of Bethlehem (No. 55, R. 20–21, 22–26, 28–32). Upon refusal

of Bethlehem and its officials to comply with the subpoenas (No. 55, R. 23–24), the State Board sought enforcement of the subpoenas in the Supreme Court of the State of New York for the County of Erie (No. 55, R. 20–36). In response to an order to show cause issued by the court on February 7, 1945 (No. 55, R. 1, 19–20), Bethlehem and its officials submitted affidavits in opposition to the State Board's application for enforcement, alleging *inter alia* that more than 80 percent of the products produced at the Lackawanna plant valued in excess of $122,000,000 was shipped to points outside the State of New York, and more than 90 percent of the materials used in the plant valued in excess of $65,000,000 was delivered to the plant from points outside the State of New York (No. 55, R. 38); that the plant was engaged in commerce within the meaning of the National Act (No. 55, R. 49–52); and that the subject matter of the proceeding before the State Board was within the exclusive jurisdiction of the National Board and not within the jurisdiction of the State Board (No. 55, R. 50).

On March 1, 1945, the court issued a memorandum decision holding that its ruling on the constitutional questions was governed by the decision of the New York Court of Appeals in *Davega City Radio, Inc.* v. *State Labor Relations Board*, 281 N. Y. 13, and by the decision of Mr. Justice Hinkley in *Allegheny Ludlum Steel Corporation* v. *Kelley, et al.*, 184 Misc. 47 (No. 55, R. 58), and

on the same day entered an order granting the State Board's application for enforcement of the subpoenas (No. 55, R. 2–18).

The order was affirmed without opinion by the Appellate Division of the Supreme Court of the State of New York for the Fourth Judicial Department on May 2, 1945 (No. 55, R. 60–61), and by the Court of Appeals of the State of New York on November 29, 1945 (No. 55, R. 62–63). On December 7, 1945, the Court of Appeals amended its remittitur, making it clear that the court had passed upon and rejected the contention that pursuant to Article I, Section 8, and Article VI, Clause 2, of the Constitution of the United States the National Board had exclusive jurisdiction over the question or controversy dealt with in the State Board proceeding (No. 55, R. 63–64).

Upon further appeals taken to this Court in both the *Allegheny* and *Bethlehem* cases, this Court on April 22, 1946, noted probable jurisdiction, consolidated the cases for argument, and requested the Solicitor General to participate (No. 76, R. 79; No. 55, R. 69–70).

SUMMARY OF ARGUMENT

I

A. When these cases arose the New York Board and courts were applying to the bargaining rights of supervisory employees a policy con-

flicting with that of the National Board. The refusal of the National Board to certify representatives of supervisory employees during that period was not a renunciation of jurisdiction over such employees, as the State authorities asserted, but was a manifestation of an affirmative policy founded on the Board's view that certification of bargaining units of supervisory employees would impair the freedom of the rank and file employees from supervisory pressure and militate against the accomplishment of the Act's main objectives. The Board continued to take jurisdiction over other types of cases involving supervisory employees. Thus when the State Board entertained the petitions in these cases and issued certifications it accomplished precisely that which the National Board was seeking to prevent, and thereby undermined the policy then being administered by the National Board. A State law may not under the Constitution be so applied as to interfere with the policy being administered under a Federal statute.

B. While the instant cases were pending on appeal below, the National Board changed its policy with respect to the bargaining rights of supervisory employees so that its policy is now the same as that which was applied by the New York Board in these cases. Nevertheless it is our view that the State action cannot stand.

1. Whether a Federal statute supersedes State legislation is primarily a matter of congressional

intention. This Court has assumed that the field in which Congress is seeking to prescribe an operative rule determines the limits beyond which it does not intend the States to encroach. Although we do not believe that determination of the "field" in which a Federal statute operates mechanically establishes the invalidity of State legislation in that field, we think that the confusion in administration which normally will result from the co-existence of two systems of regulation of the same subject justifies a presumption—the weight of which will vary with the circumstances—that Congress does not intend the field which it regulates to be simultaneously controlled by another sovereign. This we conceive to be the true meaning of the "occupancy of the field" cases, and the way in which they can be synthesized with the recent authorities stressing the importance of interference by the State statute with the operation of the Federal. In the present cases the State and Federal laws operate in exactly the same field, and the history of the National Act confirms rather than rebuts the presumption of an intention that the National Board have exclusive jurisdiction in that field. There is no basis for respondents' suggestion that the Federal statute controls the conduct of only those persons with respect to whom cases have been brought before the National Board.

2. Apart from any presumption as to occupancy of the field, the New York and federal statutes pro-

vide for different standards in determining appropriate bargaining units and thereby impose different and inconsistent obligations on employers. The necessities of practical administration of the National Act and the language and history of that Act lead to the same conclusion.

(a) Even when Federal and State agencies are applying the same policies, each is necessarily exercising the judgment of the individuals who compose it, with the result that decisions in identical cases are not necessarily the same. The possibility of different rulings as to bargaining unit boundaries clearly exists in any representation case, as experience demonstrates. Since Congress intended the provisions of the National Act to be effectuated uniformly in accordance with the judgment and discretion of the National Board, the exercise of authority by the State Board in lieu of the National impairs the full and complete attainment of the National policy.

The seriousness of this danger is aggravated by the fact that the very possibility that different boards may reach different decisions will cause parties, if they have a choice between boards, to take their case to the one whose decisions they anticipate will be the more favorable. The National Board frequently can not protect itself against such resort to a State agency, since it acts only when charges or petitions are filed with it. It is apparent that effective administration of the National statute will be impaired if persons may

resort to State boards for the deliberate purpose of obtaining decisions which would not be rendered by the National Board.

(b) The provision in Section 10 (a) of the National Act that the National Board is to have "exclusive" power which is not to "be affected by any other * * * law" was designed to prevent this very type of confusion, as the legislative history shows. Congress at that time was thinking in terms of the harmful consequences of the diffusion of responsibility at the Federal level, since there were then no comparable state laws. Clearly, however, the same considerations apply with even greater force to the exercise of concurrent jurisdiction by 48 states; it is highly unlikely that Congress would have been inclined to open the door to intrusions by State authorities which it closed to intrusions by Federal authorities. Section 10 (a) in terms would seem to apply to State laws as well as Federal. Other provisions of the statute support this conclusion.

II

A. Although the problem is not involved in the instant cases, in order to make the Board's overall position clear, it seems desirable to point out that there are types of industries which the Board believes to be subject to its jurisdiction but in which it declines to handle cases; primarily because of budgetary limitations. In general it may be said that the Board will tend to refuse

borderline cases and those of largely local significance. In this field in which the National Board can but does not take jurisdiction it is obviously more consonant with the policy of the National statute to permit enforcement of State laws embodying the same policy than to leave the employees' rights without any statutory protection. The friction, confusion and uncertainty arising from the application of dual controls are non-existent where the National Board will not exercise its jurisdiction. This justifies excepting this field from the otherwise exclusive grant of authority to the Board in Section 10 (a). The National Board accordingly believes that the mere existence of the National Act should not deprive the States of power to apply a similar policy to employers over whom the National Board declines to take jurisdiction.

B. The Board's position is illustrated by its understanding with the New York Board whereby in practice the National Board has refrained from taking jurisdiction over local industries though they may have some interstate aspects and the New York Board has refrained from handling cases (except for those involving supervisory employees) in the industries customarily controlled by the National Board. Each Board recognizes the confusion inherent in a system of dual control. The result is that, save in the instant cases, the State Board has not entertained matters over which the National Board has consistently taken jurisdiction, and

conversely the National Board has refused to exercise jurisdiction over local industries, leaving the matter to the State Board. The sensible practice which the Boards have adopted may point the way to a wise solution of the over-all problem.

ARGUMENT

These cases are concerned with manufacturing plants in the steel industry unquestionably subject to the authority of the National Labor Relations Board. Point I of the following discussion will be devoted to a consideration of the status under the National and the State labor relations acts of this type of predominantly interstate operation in an industry nation-wide in scope, the only question which these cases raise. In order that the Board's position may be completely clear, however, other aspects of the question of intergovernmental relations facing the Board are discussed in Point II. We take no position on other issues in the cases, including the State's contentions, made below, that the constitutional question cannot properly be decided in actions for declaratory judgment or subpoena enforcement.

I

THE NATIONAL LABOR RELATIONS ACT SUPERSEDES THE NEW YORK STATUTE AS IT HAS BEEN APPLIED IN THESE CASES

As the Statement indicates, these cases were begun and decided by the New York Board and the Supreme Court of New York when the New

York policy on bargaining rights of supervisory employees differed from that of the National Board. When these cases were before the Appellate Division and the Court of Appeals of the State of New York, the policy of the two Boards was the same in this respect. Since neither the Appellate Division nor the Court of Appeals wrote opinions, we do not know whether they took the change in National policy into account. It seems advisable to deal separately with the two periods.

A

THE STATE BOARD MAY NOT ENFORCE A POLICY CONFLICTING WITH THAT APPLIED BY THE NATIONAL BOARD

When the opinions of the New York Board and courts in these cases were written, the state and national Boards were applying contrary policies to the bargaining rights of supervisory employees. The New York authorities have not, of course, denied that when state and Federal statutes conflict, the latter prevails. The court below conceded (No. 76, R. 60) that if the rule applied by the State Board was in conflict with a national policy the state rule could not validly be applied to appellants. It sought to avoid finding such a conflict, however, by viewing the policy of the National Board in refusing to certify representatives selected by supervisory employees as a mere renunciation by the National Board of jurisdiction over the question of collective bargaining relations between supervisory employees

and employers (No. 76, R. 60–63). Adopting this view, the court below concluded in effect that there was no federal policy in the field with which the application of the state rule could conflict (*ibid.*). In so holding, we believe, the court below erred.

From the very beginning the National Board has exercised jurisdiction over questions involving the rights of supervisory employees, in industries subject to the National Act, to organize and bargain collectively. The Board has uniformly held that supervisors are "employees" within the meaning of Section 2 (3) of the National Act; it has uniformly held that supervisors possess the right to self-organization guaranteed in Section 7 of the National Act; and it has uniformly held that employer discrimination against supervisors which discourages their exercise of that right is violative of Section 8 (3) of the National Act.[8] Moreover, the Board has invariably held

[8] *Matter of Fruehauf Trailer Co.*, 1 N. L. R. B. 68, 76, enf'd, 301 U. S. 49; *Matter of Remington Rand, Inc.*, 2 N. L. R. B. 626, enf'd, 94 F. 2d 862, 870–871 (C. C. A. 2), certiorari denied, 304 U. S. 576; *Matter of American Potash & Chemical Corp.*, 3 N. L. R. B. 140, 158, 159, enf'd, 98 F. 2d 488 (C. C. A. 9), certiorari denied, 306 U. S. 643; *Matter of Star Publishing Co.*, 4 N. L. R. B. 498, 505, enf'd, 97 F. 2d 465 (C. C. A. 9); *Matter of Warfield Co.*, 6 N. L. R. B. 58, 61–64; *Matter of Atlantic Greyhound Corp.*, 7 N. L. R. B. 1189, 1196; *Matter of Horace Prettyman*, 12 N. L. R. B. 640, 655, 656, rev'd on other grounds, 117 F. 2d 786 (C. C. A. 6); *Matter of Skinner & Kennedy*

that in industries where collective bargaining by supervisors has long been customary, bargaining units composed of supervisors in whole or in part are appropriate within the meaning of Section 9 (b) of the National Act.[8] Indeed, prior to

Co., 13 N. L. R. B. 1186, enf'd. 113 F. 2d 667, 671 (C. C. A. 8); *Matter of Luzway, Inc.*, 16 N. L. R. B. 37, enf'd 123 F. 2d 106, 108 (C. C. A. 2); *Matter of Eagle-Picher Mining & Smelting Co.*, 16 N. L. R. B. 727, enf'd. 119 F. 2d 903, 914 (C. C. A. 8); *Matter of Condenser Corp.*, 22 N. L. R. B. 347, 386–389, enf'd. 128 F. 2d 67 (C. C. A. 3); *Matter of Hazel-Atlas Glass Co.*, 34 N. L. R. B. 346, enf'd. 127 F. 2d 109, 117, 118 (C. C. A. 4); *Matter of Golden Turkey Mining Co.*, 34 N. L. R. B. 760, 776–779; *Matter of Shell Oil Co.*, 34 N. L. R. B. 866; *Matter of Whiting-Mead Co.*, 45 N. L. R. B. 987, 1013–1018, enf'd. 148 F. 2d 817 (C. C. A. 9); *Matter of Richter's Bakery*, 46 N. L. R. B. 447, enf'd. 140 F. 2d 870 (C. C. A. 5), certiorari denied, 322 U. S. 754; *Matter of Jones & Laughlin Steel Corp.*, 54 N. L. R. B. 679, enf'd. 146 F. 2d 833 (C. C. A. 5), certiorari denied, 325 U. S. 886; *Matter of Soss Mfg. Co.*, 56 N. L. R. B. 348.

Even before the National Act was passed, the self-organizational activities of supervisors were accorded protection by administrative agencies established by Congress to administer Section 7 (a) of the National Industrial Recovery Act, 48 Stat. 195. See, e. g., *Matter of Available Truck Co.*, 2 N. L. R. B. (old) 68; *Matter of Geuder, Paeschke & Frey Co.*, 2 N. L. R. B. (old) 393; *Matter of Pennsylvania-Dixie Cement Corp.*, 2 N. L. R. B. (old) 417.

[8] In the maritime trades the Board has consistently found bargaining units composed of masters, mates, and pilots to be appropriate. *Matter of International Mercantile Marine Co.*, 1 N. L. R. B. 384; *Matter of Lykes Bros. Steamship Co.*, 2 N. L. R. B. 102; *Matter of Black Diamond Steamship Corp.*, 2 N. L. R. B. 241; *Matter of Swayne & Hoyt, Ltd.*, 2 N. L. R. B. 282; *Matter of Grace Line, Inc.*, 2 N. L. R. B. 369; *Matter of Ocean Steam-*

the *Maryland Drydock* case, the Board held that units of supervisory employees were generally appropriate for purposes of collective bargaining,

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ship Co., 2 N. L. R. B. 588; *Matter of New York & Cuba Mail Steamship Co.*, 2 N. L. R. B. 595; *Matter of Seas Shipping Co.*, 8 N. L. R. B. 422; *Matter of Standard Oil of New Jersey*, 8 N. L. R. B. 936; *Matter of New York & Cuba Mail Steamship Co.*, 9 N. L. R. B. 51; *Matter of Tide Water Associated Oil Co.*, 9 N. L. R. B. 823; *Matter of Cities Service Oil Co.*, 10 N. L. R. B. 954; *Matter of Aerovox Corp.*, 10 N. L. R. B. 652; *Matter of The Texas Co.*, 23 N. L. R. B. 1022; *Matter of A. H. Bull Steamship Co.*, 36 N. L. R. B. 99; *Matter of Carnegie-Illinois Steel Corp.*, 37 N. L. R. B. 19; *Matter of Jones & Laughlin Steel Corp.*, 37 N. L. R. B. 366; *Matter of Draco Corp.*, 39 N. L. R. B. 846; *Matter of Federal Mogul Corp.*, 66 N. L. R. B. 532; *Matter of Kelsey-Hayes Wheel Co.*, 66 N. L. R. B. 570; *Matter of Celotex Corp.*, 66 N. L. R. B. 744. In the only case in which such a unit finding was contested, the Board's order was sustained by the circuit court of appeals. *Jones & Laughlin Steel Corp.* v. *National Labor Relations Board*, 146 F. 2d 833 (C. C. A. 5), certiorari denied, 325 U. S. 886.

In the printing trades the Board has often found bargaining units composed of both supervisors and rank and file employees to be appropriate. *Matter of Cullom & Ghertner Co.*, 14 N. L. R. B. 270; *Matter of W. F. Hall Printing Co.*, 51 N. L. R. B. 640; *Matter of Country Life Press Corp.*, 51 N. L. R. B. 1362; *Matter of Union Bag & Paper Corp.*, 52 N. L. R. B. 591; *Matter of A. S. Abell Co.*, 54 N. L. R. B. 62; *Matter of Times-Mirror Co.*, 54 N. L. R. B. 787; *Matter of Service Printers, Inc.*, 54 N. L. R. B. 1082; *Matter of Proximity Mfg. Co.*, 54 N. L. R. B. 1179; *Matter of Cincinnati Daily Newspaper Publishers Assn.*, 55 N. L. R. B. 571; *Matter of Leo Lichtenstein*, 55 N. L. R. B. 1429; *Matter of Rapidwax Paper Co.*, 56 N. L. R. B. 1774. Instances are not confined to the printing industry. See e. g., *Matter of Campbell Machine Co.*, 3 N. L. R. B. 793; *Matter of Merrimack Mfg. Co.*, 9 N. L. R. B. 173; *Matter*

and certified representatives selected by employees in such units.[10]

But while supervisors, in relation to their employers, are thus held to be "employees" within the meaning of Section 2 (3) of the National Act, the courts have also said that in relation to their subordinates supervisors are "employers" within the meaning of Section 2 (2). *National Labor Relations Board* v. *Skinner & Kennedy Co.*, 113 F. 2d 667, 671 (C. C. A. 8); *Jones & Laughlin Steel Corp.* v. *National Labor Relations Board*, 146 F. 2d 833 (C. C. A. 5), certiorari denied, 325 U. S. 886. For the economic power which employers vest in supervisory employees lends coercive weight to their conduct, as it does to the employer's own. Consequently when supervisors participate in organizational activity among rank and file employees their conduct is considered violative of the Act. See, e. g., *H. J. Heinz Co.* v. *National Labor Relations Board*, 311 U. S. 514, 520; *National Labor Relations Board* v. *Moench Tanning Co.*, 121 F. 2d 951, 953 (C. C. A. 2); *Birmingham Post Co.* v. *National Labor Relations Board*, 140 F. 2d 638, 639–640 (C. C. A. 5). The

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of Willys-Overland Motors, 9 N. L. R. B. 924; *Matter of Consumers Power Co.*, 9 N. L. R. B. 742; *Matter of Richmond Hosiery Mills*, 8 N. L. R. B. 1073; *Matter of Jones Lumber Co.*, 3 N. L. R. B. 855; *Matter of J. C. Sanders Cotton Mill Co.*, 31 N. L. R. B. 298; *Matter of Harris-Hub Bed & Spring Co.*, 13 N. L. R. B. 1236; *Matter of Coos Bay Lumber Co.*, 62 N. L. R. B. 93.

[10] *See notes 3, 4, supra*, p. 4.

Board has therefore been faced with the problem of accommodating the statutory rights of supervisors to the statutory rights of rank and file employees, an accommodation which requires insulation of the organizational activity of subordinates from supervisory pressure. It was this problem, primarily, with which the Board dealt, first in the *Union Collieries* case, then in the *Maryland Drydock* case, and later in the *Packard* case.

Upon balancing the organizational rights of supervisors against the rights of rank and file employees in the *Maryland Drydock* case, the Board arrived at the conclusion that in the state of self-organization existing in mass production industry, it was of greater importance to the attainment of the objectives of the Act that supervisors be excluded from organizations of rank and file employees than that supervisors be accorded the benefits of collective bargaining. The Board believed that if it held that supervisory employees in such industries constituted appropriate bargaining units, it would then be powerless to prevent the representatives selected by such units from amalgamating with rank and file representatives, creating a condition in which the supervisors might unduly influence the rank and file. It was for this reason, and in order to effectuate the policies of the Act, that the Board in that case established the rule that bargaining units of

supervisory employees in mass production industry were not appropriate within the meaning of Section 9 (b)."[11]

[11] Two years later, the Board, having observed that application of the *Maryland Drydock* rule led to frequent and serious strikes, disruptive of interstate commerce and war production, reconsidered the entire problem in the *Packard* case (61 N. L. R. B. 4). It there concluded that in view of the needs of supervisors for collective bargaining (61 N. L. R. B. at 8–12) and of the disruptions of commerce which had resulted from the Board's denial of protection to their right to bargain collectively (61 N. L. R. B. at 12–14), the rule of the *Maryland Drydock* case was not a satisfactory accommodation of interests (61 N. L. R. B. at 18–21). The Board, therefore, found that bargaining units of supervisory employees were appropriate, and announced that it would certify, as representatives of such units, labor organizations unaffiliated with rank and file representatives. For subsequent proceedings in the same case see 64 N. L. R. B. 1212, enforced August 12, 1946, 18 L. R. R. M. 2268 (C. C. A. 6). In *Matter of Jones & Laughlin Steel Corp.*, 66 N. L. R. B. 386, decided March 7, 1946, the Board gave further consideration to this question. It concluded that in view of the statutory grant of "full freedom" in the selection of representatives to all employees it was powerless to deny to supervisors, as to other employees, the right to be represented by any bona fide labor organization of their choice whether affiliated or unaffiliated. The present practice of the Board, therefore, is to certify as bargaining representatives of units of supervisory employees labor organizations which admit to membership rank and file employees as well as those which do not. The Board continues, however, to protect rank and file employees from supervisory pressure manifested by open and active support of or opposition to labor organizations which admit rank and file employees to membership. See e. g. *Matter of Climax Engineering Co.*, 66 N. L. R. B. 1359.

Both this approach and the approach adopted in the *Maryland Drydock* case represent, in our opinion, entirely reasonable exercises of the discretion vested in the Board to deal

This action by the Board cannot, we submit, be construed as a waiver of its statutory jurisdiction to determine the self-organizational rights of supervisory, as well as of rank and file, employees. The Board continued to protect supervisors who joined labor organizations composed of fellow supervisors against employer discrimination. *Matter of Soss Mfg. Co.*, 56 N. L. R. B. 348. It continued to find violative of Section 8 (3) of the Act the discriminatory discharge of supervisors who joined labor organizations composed of rank and file employees, when it appeared that the employer's motive in discharging the supervisor was to discourage rank and file membership in the organization. *Matter of Whiting-Mead Co.*, 45 N. L. R. B. 987, 1013–1018, enf'd 148 F. 2d 817 (C. C. A. 9). In no sense did the Board during this period treat supervisors as though they, like agricultural laborers, were excluded from the statutory definition of "employee" (Section 2 (3)).

The Board's action following the *Maryland Drydock* case in consistently dismissing petitions for investigation and certification of representatives involving units of supervisory employees, did not, as the New York Board and courts held, constitute a refusal to assert jurisdiction

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with the difficult problem of accommodating the primary interests of rank and file employees in freedom from supervisory pressure to the interests of supervisors in collective bargaining.

over the subject matter of such petitions. On the contrary, that action, as the Board's Regional Director for the Third Region informed the State Board (No. 55, R. 56), constituted an assertion of jurisdiction and affirmative holding that the units involved in the petition were not appropriate for purposes of collective bargaining within the meaning of Section 9 (b) of the National Act. The Board's action in dismissing a petition on this ground is no less an assertion of its statutory jurisdiction to determine the appropriateness of collective bargaining units (Section 9 (b)) and the existence of questions concerning representation (Section 9 (c)) than is the dismissal of a petition on the ground that the history of collective bargaining in the plant involved shows that the craft unit for which petitioner seeks certification is not appropriate;[12] or that the unit is inappropriate because employees otherwise eligible are excluded on the basis of race;[13] or that the unit is inappropriate because it includes but a single employee;[14] or on the ground

[12] National Labor Relations Board, *Third Annual Report* (1939), pp. 160–163; *Matter of Bendix Products Corp.*, 15 N. L. R. B. 965, and *Matter of American Can Co.*, 13 N. L. R. B. 1252, discussed in National Labor Relations Board, *Fifth Annual Report* (1941), pp. 65–66; National Labor Relations Board, *Tenth Annual Report* (1946), pp. 28–30.

[13] *Matter of Utah Copper Co.*, 35 N. L. R. B. 1295, 1300, and cases therein cited.

[14] Compare the contrary decision of the New York Board, enforced in *New York State Labor Relations Board* v. *Metropolitan Life Ins. Co.*, 183 N. Y. Misc. 1064, 52 N. Y. S. 2d.

that no question concerning representation exists because the unit is covered by a valid collective bargaining agreement;[15] or because the petitioning labor organization is the successor of a union previously found to have been company-dominated.[16] When the State Board entertained foremen's petitions for an election and issued a certification, it accomplished precisely that which the National Board was seeking to prevent, and thereby undermined the policy then being administered by the National Board.

Certainly it could not be contended that if a State Board found that a craft unit is appropriate, in circumstances in which the National Board, following well defined policies would deem such a unit inappropriate, the State Board finding would not be in conflict with Federal law. Compare *United Office & Professional Workers* v. *Smiley*, 18 L. R. R. M. 2356 (E. D. Pa., Aug. 20, 1946), and discussion at p. 53, *infra*. Nor could it be contended that if a State Board di-

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590, affirmed, 269 App. Div. 934, 58 N. Y. S. 2d 343, 295 N. Y. 839, 66 N. E. 2d 853, with *Matter of Luckenbach Steamship Co.*, 2 N. L. R. B. 181, 193, and *Matter of Rosenhirsch Co.*, 38 N. L. R. B. 619, 621.

[15] National Labor Relations Board, *Third Annual Report* (1939), pp. 134–138; National Labor Relations Board, *Sixth Annual Report* (1942), pp. 55–56; National Labor Relations Board, *Ninth Annual Report* (1944), pp. 25–28.

[16] *Matter of Dade Drydock Corp.*, 58 N. L. R. B. 833, and *Matter of Standard Oil Co.*, 63 N. L. R. B. 990, discussed in National Labor Relations Board, *Tenth Annual Report* (1946), pp. 16–17.

rected an election at a time when the National Board, pursuant to its general policy, would refuse to conduct an election because it regarded an existing contract as a bar, the action of the State Board would not be in conflict with the administration of the National Act.

The State Board proceeded on the assumption that the Act has no effect except when the National Board has instituted proceedings. But it is the National statute, not the Board, which creates the obligations which employers are required to accept.[17] The Board construes and enforces these obligations, and the Board's interpretation of the Act is to be followed except where judicially disapproved.[18] The Act could not operate effectively if its substantive requirements were not to be heeded by any employer except where the Board has entered an order with respect to him. Like other statutes enforced by sanctions, the Act presupposes that its provisions

[17] Excepting for remedial requirements specified by the Board in its orders in particular cases.

[18] The National Board's interpretation of the National Act has not been challenged here. Congress has entrusted the effectuation of the policies of the National Act to the discretion of the National Board, and that Board has leeway to adopt even conflicting policies, as it deems advisable, so long as each has a reasonable basis in the law. The diverse opinions of the shifting majorities and minorities of the National Board on the supervisory employee question all, in our view, satisfy this test of reasonableness. Thus, the National Act, as interpreted by the National Board, has always controlled the obligation of employers to bargain collectively with supervisory employees.

will be observed by most law-abiding citizens without the necessity for enforcement by litigation. It is thus the Federal statute, as interpreted by the Board, and not merely the orders of the Board, which imposes obligations and duties upon the employer.

It is no answer to say, as the State Board has said, that the action of the State Board in finding appropriate bargaining units of supervisors and certifying representatives selected by such units is not in conflict with Federal law because, although the National Board would find to the contrary, it would not order the employers involved *not* to bargain with such representatives (Compare No. 76, R. 31–32, 56–57). The state's argument overlooks the difference between the effect of voluntary bargaining by the employer and bargaining compelled by law. The reason underlying the Board's refusal, in the *Maryland Drydock* case, to order collective bargaining with foremen was fear of interference with the bargaining activities of rank and file employees. Such interference was likely to be much greater if the employer was required by law to bargain with the foremen than if he merely was permitted to do so if he was willing. Obviously, for purposes of this policy it would be immaterial whether the legal obligation with which the employer was required to comply was enforced by a state board rather than by the National. In either case there would be the possibility of con-

flict, then regarded by the National Board as controlling, between the foremen treated as representatives of the employer and the foremen as employees.

The state has relied on cases which hold that state laws may be applied during a period in which a federal administrative body has exercised no authority over a subject which it may regulate. *Welch Co.* v. *New Hampshire*, 306 U. S. 79; *Eichholz* v. *Public Service Commission*, 306 U. S. 268; *Mintz* v. *Baldwin*, 289 U. S. 346; *Northwestern Bell Telephone Co.* v. *Nebraska State Ry. Commission*, 297 U. S. 471; *Ill. Cent. R. R. Co.* v. *Public Utilities Comm.*, 245 U. S. 493. These decisions, which are predicated on the assumption that the federal act itself does not impose any operative regulation or manifest a congressional intention that the federal control be exclusive, have no bearing when the federal administrative body is applying federal law and policy, even though by inaction in the particular case.[19] The National Board, in refusing to entertain foremen's petitions, was enforcing its policy that employers not be required to bargain with foremen—a policy which would preclude state compulsion as well as national. The Board's inaction in this

[19] They may by analogy support state action with respect to industries or businesses which the National Board for administrative reasons does not subject to its authority. See pp. 66–77, *infra*. The analogy is not perfect, however, since the federal statute here itself imposes the obligation. See pp. 34–35, *supra*.

type of case thus manifests an intention to exclude the establishment of any other rule by a state. In these circumstances, "the failure of the federal official to exercise his full power is in effect a controlling administrative ruling that no further regulation by either federal or state government is needful. *Napier* v. *Atlantic Coast Line Ry. Co.*, 272 U. S. 605." *Cloverleaf Butter Co.* v. *Patterson*, 315 U. S. 148, 170, Mr. Chief Justice Stone dissenting.[20] The *Napier* case, cited by Chief Justice Stone, and others like it, which hold that when the federal law is meant to establish an exclusive regulation, the state may not control the subject even in the absence of any steps by the federal agency, would seem to be most closely applicable. See, in addition to the *Napier* case, *Oregon-Washington R. & Nav. Co.* v. *Washington*, 270 U. S. 87; *Alabama and V. Ry.* v. *Jackson and E. Ry.*, 271 U. S. 241; *Missouri Pacific R. Co.* v. *Porter*, 273 U. S. 341; *Northern Pacific Ry. Co.* v. *Washington*, 222 U. S. 370.

Thus during the period in which the state policy was contrary to the Federal with respect to certifying bargaining units of supervisory employees, it seems clear that the action of the State Board impaired the administration of the National Act by the body which Congress had charged with the administrative responsibility.

[20] With respect to the above proposition, there would seem to have been no divergence of opinion between the majority and dissenting opinions in the *Cloverleaf* case.

That the state may not enforce its policy in such circumstances would seem to be axiomatic. See *Hill* v. *Florida*, 325 U. S. 538; *Allen-Bradley Local* v. *Wisconsin Employment Relations Board*, 315 U. S. 740, 751; *Hines* v. *Davidowitz*, 312 U. S. 52, 67. Accordingly if the Court views the cases as of the time they were instituted by the New York Board, when the sole object of the petitioning foremen's union was to circumvent the policy of the National Board, it should unquestionably reverse the judgments below.

B

THE FEDERAL STATUTE SUPERSEDES THE STATE STATUTE, EVEN WHEN THE POLICIES BEING APPLIED UNDER THEM ARE THE SAME

As we have seen the New York State Board and courts have held that even during the period in which the Federal and State policies on the supervisory employee question were diametrically opposed, the State Board could exercise jurisdiction over and compel bargaining by employers and employees subjected by the National Board to the National Act, so long as the National Board had not entertained a proceeding against the same employer with respect to the very same matter. Inasmuch as the National Board has since changed its policy; the case in its present posture also involves the authority of the State Board when the Federal and State policies are not in conflict.

1. The theory of supersedure and its application to these cases

The principles which this Court has followed in determining when Federal law precludes the operation of state legislation have been repeatedly stated. Many cases, and particularly the recent ones, have declared that the question is whether the operation of the state law interferes with or otherwise impairs the effectuation of the policy of the national statute. *Cloverleaf Butter Co.* v. *Patterson*, 315 U. S. 148; *Hines* v. *Davidowitz*, 312 U. S. 52, 67. Many other cases dealing with the problem have sought to determine whether the state law invades "a field" occupied by Congress.[21] These cases hold that state action is superseded if Congress has "occupied the field."

In our view the controlling element underlying the determination whether Federal and state laws can stand together is the intention of Congress. Since the Federal statutes emanate from Congress, it is primarily for that body to determine their effect. If Congress expresses its intention as to whether state laws on the subject regulated shall stand or fall, that intention is controlling, assuming the subject to be one properly within

[21] E. g., *Second Employers' Liability Cases*, 223 U. S. 1, 54–55; *Adams Express Co.* v. *Croninger*, 226 U. S. 491; *Missouri Pacific R. Co.* v. *Porter*, 273 U. S. 341; *Alabama and V. Ry.* v. *Jackson and E. Ry.*, 274 U. S. 244; *Oregon-Washington R. & Nav. Co.* v. *Washington*, 270 U. S. 87; *Charleston & Car. R. R.* v. *Varnville Co.*, 237 U. S. 597; *Napier* v. *Atlantic Coast Line Co.*, 272 U. S. 605; *Southern Ry. Co.* v. *R. R. Comm. of Indiana*, 236 U. S. 439.

the Federal constitutional power. See *Prudential Ins. Co.* v. *Benjamin*, decided June 3, 1946, No. 707, 1945 Term. But in most of the cases which reach this Court, there is usually no express manifestation of congressional intention.

In the absence of any explicit showing of what Congress intended, it is necessary to examine the effect of the state law upon the operation of the Federal. If the provisions of the statutes conflict, or if the accomplishment of the policy of the state law will definitely prevent attainment of the policy of the Federal, the case is simple, since clearly Congress would not intend a state law to be so applied.

Often, however, it is not easy to determine whether the policies of the statutes conflict. That may depend on whether the Federal statute is conceived as designed only to govern a subject to the extent that it affirmatively regulates it, or is meant to prescribe a complete system of control with the intention that matters as to which no Federal requirements have been imposed shall be left free from regulation by the states. It was in cases raising issues of that sort that the concept of the "field" occupied by the Federal law became important. For the Court assumed that the field in which Congress was seeking to prescribe the operative rule, whether affirmatively or not, determined the limits beyond which Congress did not intend the states to encroach.

This does not necessarily follow. It might be perfectly obvious, even without any express showing of its intention, that Congress would have no objection to the application of harmonious state laws to the very transactions it was regulating. Thus a state price or wage control law prescribing exactly the same prices or wages as a Federal statute, but imposing penalties enforceable in the state courts, might lessen a difficult Federal policing problem and thus greatly facilitate enforcement of the Congressional policy.[22]

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[22] A number of state statutes and municipal ordinances punish violations of price regulations issued under the Emergency Price Control Act or rationing regulations under the Second War Powers Act. E. g., Laws of New York, 1942, chap. 445, 544, Sec. 7 (6) and New York State War Council Resolution of April 28, 1943; Rhode Island Laws, 1943, pp. 141-143; Wisconsin Laws, 1943, c. 550; California Stat. 1945, p. 164; New York City Administrative Code, Secs. U41-4.0, U41-5.0 (Local Laws 34 and 35, 1945). The ordinances and statutes are collected in OPA General Desk Book, Vol. 1, p. 5001, *et seq.* The Office of Price Administration has supported the constitutionality of such measures, which have been upheld in Michigan and New York, but invalidated in Ohio. *People* v. *Sell*, 310 Mich. 305, 17 N. W. 2d 193; *People* v. *Mailman*, 293 N. Y. 887, 59 N. E. 2d 790, affirming 49 N. Y. S. 2d 733, 182 N. Y. Misc. 870; *People* v. *Lewis*, 295 N. Y. 42, 64 N. E. 2d 702. Contra: *City of Cleveland* v. *Piskura*, 145 Ohio St. 144, 60 N. E. 2d 919. Similar state statutes, prepared with the assistance of the National Recovery Administration, implemented the National Industrial Recovery Act. See Comment, 33 Mich. L. Rev. 597 (1934); Note, 34 Col. L. Rev. 1077 (1934); Mayers, *A Handbook of N. R. A.* (2d Ed., 1934, pp. 397, *et seq.*); 1 U. S. Law Week 211 (1933), 911 (1934); Clark, *State Industrial Recovery Acts and*

Nevertheless, we believe that the concept of occupation of the field is not devoid of value, even though it should not be treated as a mechanical formula which will solve all difficulties. For we think it reasonable to assume, or presume, that the fact that Congress lays down a governing rule for a subject is a strong indication that Congress does not intend the very same subject to be regulated by another sovereign. Frequently the co-existence of two laws regulating the same subject, albeit not inconsistently, would result in such confusion and division of responsibility as to impair the effective operation of either. This, we submit, is the basis for the uniform line of decisions in this Court setting aside state laws which operate "in respect of the same matter" as Federal legislation (*Gilvary* v. *Cuyahoga Valley Ry. Co.*, 292 U. S. 57, 60), even in the absence of any showing of direct repugnancy. "Occupancy of a field" by a Federal statute may properly be regarded as a factor presumptively, though not conclusively, establishing an intention that the subject regulated is to be governed exclusively by that statute.

State Codes, 20 A. B. A. J. 343 (1934); *Darweger* v. *Staats*, 267 N. Y. 290, holding New York law invalid; *In re Lasswell*, 1 Cal. App. 2d 183, holding California law valid. References to other Federal statutes, including the Pure Food and Drug Act, Migratory Bird Treaty Act, and Federal Narcotic Act, which have been incorporated in state laws, are contained in Comment, 33 Mich. L. Rev. 597, 601–603 (1934). As to the Pure Food and Drug Act, see *Smith* v. *Alphin*, 150 N. C. 425, 428, 64 S. E. 210.

The strength of such a presumption probably will vary with the particular situation. When a Federal law does not establish a rigid regulatory scheme (such as the price and wage illustrations referred to above), but depends to any substantial extent for its effectuation on the discretion of a congressionally established administrative body, there is special reason for assuming that the Federal regulation is to be exclusive. Since discretionary matters will inevitably be handled differently by different individuals, submission of a matter to a state agency, even one applying the same general policy, may produce a different result than submission to the Federal. If parties can choose between Federal and state tribunals in such circumstances, a petitioner will select that which he believes more favorable to him. If that should be the state agency, the congressional intention that the enforcement program be administered in accordance with the discretion to be exercised by the Federal body will be undermined. Thus, at least presumptively, it would appear that in many situations determination of the scope of the Federal regulatory statute—of the "field" which it regulates—would in itself determine the bounds of permissible state action, that is, state action which will not interfere with the attainment of the congressional objective. It is this analysis which has led us to believe that the "field" approach to the problem, regarded as establishing a presumption, is not only consistent

with but in its essence an application of the underlying test whether the state law impairs the effectuation of the Federal policy.

These principles apply whether the Federal statute is regulating transactions which are themselves interstate or matters which affect interstate commerce. *Cloverleaf Butter Co.* v. *Patterson*, 315 U. S. 148, 156–157. Clearly the potentialities of confusion in administration resulting from a system of dual control are the same in either situation. Where the regulation of intrastate activities affecting interstate commerce is "intended to solve a national problem on a national scale", as is the National Labor Relations Act (*National Labor Relations Board* v. *Hearst Publications*, 322 U. S. 111, 123), there is particular reason for applying the customary rule.

We are aware that the Court has frequently had difficulty in determining just what "field" a Federal statute was meant to occupy. In many of these cases the Federal statute actively regulated some aspects of a subject but not others, and the question was whether Congress meant to cover the whole subject or merely the affirmatively regulated portions.[23] In another series of cases Congress

[23] E. g., *Cloverleaf Butter Co.* v. *Patterson*, 315 U. S. 148; *New York Central R. R. Co.* v. *Winfield*, 244 U. S. 147; *Erie R. R. Co.* v. *New York*, 233 U. S. 671; *Adams Express Co.* v. *Croninger*, 226 U. S. 491; *Savage* v. *Jones*, 225 U. S. 501; *Kelly* v. *Washington*, 302 U. S. 1.

did not itself lay down any operative rule, but authorized an administrative body to do so in specified situations; the issue was whether the "field" was federally occupied when the administrative body had not exercised its authority.[24] None of these cases, however, expresses any doubt as to the status of state laws within whatever is conceived to be the federally regulated "field". As Mr. Justice Stone noted in his dissent in *Hines* v. *Davidowitz*, 312 U. S., at 78, "* * * we must know the boundaries of that field before we can say that it has precluded a state from the exercise of any power reserved to it by the Constitution." Once the boundaries are known, however, it appears to have been assumed that state action within those boundaries is foreclosed.

In none of the cases, including those upon which appellee relies and those adopting the less mechanical approach, has the Court permitted state

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[24] Cases holding that Congress intended the Federal statute to be exclusive even in the absence of Federal administrative action: *Napier* v. *Atlantic Coast Line Railroad Co.*, 272 U. S. 605; *Oregon-Washington R. & Nav. Co.* v. *Washington*, 270 U. S. 87; *Alabama and V. Ry.* v. *Jackson and E. Ry.*, 271 U. S. 244; *Missouri Pacific R. Co.* v. *Porter*, 273 U. S. 341; *Northern Pacific Ry. Co.* v. *Washington*, 222 U. S. 370. Cases holding the contrary: *Welch Co.* v. *New Hampshire*, 306 U. S. 79; *Eichholz* v. *Public Service Commission*, 306 U. S. 268; *Mintz* v. *Baldwin*, 289 U. S. 346; *Northwestern Bell Telephone Co.* v. *Nebraska State Ry. Commission*, 297 U. S. 471; *Ill. Cent. R. R. Co.* v. *Public Utilities Comm.*, 245 U. S. 493.

laws to govern those matters which were simultaneously and affirmatively being subjected to regulation by the Federal Government.[25] As to those matters which Congress has affirmatively regulated—or which an administrative agency is affirmatively regulating—the Court has always assumed that Congress did not mean them to be subjected to state regulation as well. And this has been assumed to be so whether or not the state law was in conflict with the Federal. As Mr. Justice Holmes stated for the Court in *Charleston & Car. R. R.* v. *Varnville*, 237 U. S. 597, 604: "When Congress has taken the particular subject-matter in hand coincidence is

[25] The opinion of Mr. Justice Frankfurter, dissenting, in *Hill* v. *Florida*, 325 U. S. 538, 547, which rejects the use of "mere generalities about Congress having 'occupied the field'" (325 U. S., at 552), approvingly quotes passages from a number of opinions which declared, for example (325 U. S., at 550):

> "* * * that the intention to supersede the exercise by the State of its authority *as to matters not covered by the federal legislation* is not to be implied unless the Act of Congress fairly interpreted is in conflict with the law of the State." [Italics supplied.] *Atchison, T. & S. F. R. Co.* v. *Railroad Comm'n*, 283 U. S. 380, 392–393.

See also the passages quoted from *Savage* v. *Jones*, 225 U. S. 501, 533; *Missouri K. & T. R. Co.* v. *Harris*, 234 U. S. 412, 418–419, and *Gilvary* v. *Cuyahoga Valley R. Co.*, 292 U. S. 57, 60. Mr. Justice Frankfurter's opinion recognizes that state and federal laws cannot stand together if "as a matter of language or *practical enforcement*" they "collide." [Italics supplied.] It is the problem of "practical enforcement" which has led the National Board to urge that even consistent state laws may not be applied to industries over which the Board is exercising its authority.

as ineffective as opposition * * *". See also *Southern Ry. Co.* v. *Railroad Commission of Indiana*, 236 U. S. 439, 448; *Missouri Pacific R. R.* v. *Porter*, 273 U. S. 341, 345–346.

In the present cases there can be no dispute as to the boundary of the "field" regulated by the National Act. For present purposes we are concerned only with the employer's obligation to bargain with supervisory employees. At all times the National Board has construed the National Act as governing this obligation. See pp. 25–32, *supra*. Since this is precisely what New York has purported to regulate, it can not be said here that the state is legislating as to "phases" of the subject "left unregulated by the nation". *Cloverleaf Butter Co.* v. *Patterson*, 315 U. S., at 155. The national and state laws are thus clearly operating in the same field. We are aware of no considerations which would tend to rebut the normal presumption that in these circumstances the state law as applied cannot stand.

New York seems to assume that the field in which its statute operates is of no consequence in so far as it handles cases which had not been brought before the National Board. This argument fails to recognize that obligations are imposed by the National Act itself. We know of no prior case in which it has even been urged that in a field regulated by Congress a state retains jurisdiction over all parties except those against whom a national agency has instituted administrative proceedings in a particular case.

Those decisions in which state laws have been held to have been superseded by federal statutes which did not affirmatively govern the subject of the state regulation [26] rejected much less extreme contentions.

We have already shown that the cases upon which New York relies [27] which permit state laws to stand during a period in which a Federal administrative board has exercised no authority over the subject are not controlling. To hold, as these cases do, that unexercised discretionary power, which leaves an entire subject matter completely unregulated by Federal authority does not exclude state control is a far cry from holding that failure to exercise administrative authority over a specific issue or controversy in a field where Federal regulation is operative—in the instant case, the collective bargaining rights of foremen—likewise does not exclude state control. And it is an even farther cry from holding that absent the exercise of administrative authority over the specific parties involved in a controversy, the states remain free to apply their law, despite the fact that Federal law is applicable to the specific controversy and a Federal agency is continually exercising jurisdiction over identical questions.

In the present cases we are of the view that the same result must be reached irrespective of

[26] See cases cited in notes 23, 24, *supra*, pp. 44–45.

[27] See p. 36, *supra*.

how the problem is approached. Here the state law, as enforced, reaches a subject affirmatively regulated by the national statute. Under the cases—all of them so far as we are aware—this in itself would be sufficient to compel the holding that the state law cannot stand. If occupancy of the same field by Congress is regarded as creating merely a presumption of intention to supersede, the presumption would be controlling, for the history of the National Act confirms rather than rebuts it. See pp. 58–66, *infra*. And if we disregard the uniform assumption in the cases and look only to the practical effect of a dual system of control over labor relations, we shall show that this will interfere with and obstruct the operation of the National Act. The language and history of the National Act and the necessities of practical administration under it lead to the conclusion that, as to those matters which it regulates and those employers over whom the National Board is exercising jurisdiction, the Federal statute was intended to be exclusive apart from any notion of occupying the field.

2. The effect of applying State laws to industries controlled under the National Act

It is not necessary to elaborate on the interference with the administration of the national statute which results from application to the same employers of a state law containing conflicting provisions, or of a state policy differing from

that of the National Board. Cf. Point I A, pp. 24–38. In so far as the determination of the appropriate bargaining unit is concerned, the New York and National Acts provide different standards. The former, but not the latter, gives preference to a craft unit when the employees so decide.[28] Cf. Section 705.(2) of the New York Act with Section 9 (b) of the National Act. And the State

[28] A number of state laws, in addition to the New York statute cited in the text, require state administrators to find craft units appropriate whenever a majority of employees in a particular craft so decide. Minnesota Stats. (Mason, 1940 Supp.), Ch. 23, Sec. 4254–36 (b); Wisconsin Stats. (1939), Sec. 111.02 (6); Laws of Rhode Island (1941), Ch. 1066, Sec. 6 (2); Pennsylvania Stats. Ann. (Purdon, 1945), Title 43, Sec. 211.7 (b); Connecticut Stats. (1945 Supp.), Ch. 279, Sec. 338h (2). The National Act contains no such provision, and the National Board does not follow that policy except in cases where other factors bearing upon the appropriateness of a craft unit are evenly balanced. National Labor Relations Board, *Third Annual Report* (1939), pp. 167–174; *Eighth Annual Report* (1944), pp. 53–55. Illustrative of both different statutes and different policies are those relating to supervisory employees. Section 16 of Alabama's Bradford Act (Act of Alabama, 1943, No. 298, page 253, Code 1943, Tit. 26, Sec. 376, *et seq.*), involved in *American Federation of Labor v. McAdory*, 325 U. S. 450, makes it unlawful for, *inter alia*, "supervisory" employees to join or retain membership in labor organizations which, either themselves or through their affiliates, admit other classes of employees to membership. Section 16 (b) of the Minnesota Act (Laws of Minnesota, 1939, Ch. 440, Mason's Minnesota Statutes, Supp. 1940, Ch. 23, Sec. 4254–36 (b)), provides that supervisory employees "shall not be considered" by the Conciliator in fixing units. Each of these state laws is inconsistent with the Board's present policy. The New York Board, going to the other extreme, followed the contrary policy even during the *Maryland Drydock* period.

Board cannot designate a unit which extends beyond the State's borders, although the National Board can and frequently does designate multi-state units. See, for example, *Pittsburgh Plate Glass Co.* v. *National Labor Relations Board*, 313 U. S. 146. These factors in themselves show that the State and Federal regulations of collective bargaining impose different and inconsistent obligations on employers.

We believe that in practical operation there also will be interference and difficulty from the very fact of the existence of two boards regulating the same subject matter. This in itself gives the parties a choice of forums and leads to the inefficiencies and confusion of dual controls.

Even when the statutory provisions and the policies applied by the boards administering them are the same, the decisions in particular cases may differ. The administration of the labor relations acts calls for the exercise of judgment and discretion by the board members, both in finding facts and in deciding what orders should be entered. Thus in every representation case, judgment must be exercised as to the breadth of the approved bargaining unit. The experience of administrative agencies, as well as of courts, demonstrates that different individuals will often arrive at different conclusions in deciding the same issue. In addition, even on the same issue, different agencies may be confronted with differ-

ent records as a result of differences in investigative facilities, and this may cause the agencies to reach different conclusions.

An example of the confusion resulting from differing judgments in the course of applying similar policies to the same facts is *Matter of Creamery Package Mfg. Co.*, N. L. R. B. Case No. XII–R–341, R–2705; Wisc. Emp. Rel. Bd. Case III, No. 348 E–117. On an employer's petition the Wisconsin Board defined all office employees except supervisors as a bargaining unit, and ordered an election. The National Board, acting on the Union's petition, prescribed the same unit except that it also excluded confidential employees. Each board certified the same labor organization, but as a result of the uncertainty as to the proper unit, a strike was threatened before the National Board's determination was finally accepted.[20]

Another illustration is the treatment of petitions filed by allegedly independent unions, although the statutory provisions with respect to company-dominated unions are substantially the same in state laws as in the National Act. Because experience has revealed that many employers have in the past formed company-domi-

[20] Letter from Robert B. Watts, General Counsel, National Labor Relations Board, to Charles Fahy, Solicitor General, dated February 7, 1942, printed as an Appendix to the Memorandum for the United States as Amicus Curiae in *Allen-Bradley Local* v. *Wisconsin Employment Relations Board*, 315 U. S. 740, No. 252, October Term, 1941, pp. 32–34.

nated organizations in the guise of independent unions, the National Board carefully investigates the origins of independent unions before permitting them to appear on a ballot. Some State Boards apparently either conduct no such preliminary investigation, or are content with a less thorough investigation. The result is that, as in *Matter of Fox River Valley Knitting Co.*, N. L. R. B. Case No. XII–C–742; Wisc. Emp. Rel. Bd., Case 1, No. 432E–149, an "Independent" union may be certified as bargaining representative under a State Act, which under the National Act would be found to exist in violation of law, subject to disestablishment.

The possibility of different rulings clearly exists in any representation case. See the situation described in *United Office & Professional Workers v. Smiley*, 18 L. R. R. M. 2356 (E. D. Pa., Aug. 20, 1946); and compare *Matter of Wilson-Hubb Mfg. Co., Inc.*, 68 N. L. R. B. 853; *Matter of Evinrude Motors*, 66 N. L. R. B. 1142. With respect to foremen's petitions such as are involved in these cases, the State and National Boards (the latter after the *Packard* decision) might fix different limits for bargaining units, as in the *Creamery Package* case, or the National Board might hold the petitioning organizations to be company-dominated when the State Board would not.

Thus even when the statutes and administrative policies are the same, cases may be decided differently. Since Congress intended the provi-

sions of the National Act to be effectuated in accordance with the judgment and discretion of the National Board, the exercise of authority by the state boards in lieu of the National impairs the full and complete attainment of the National policy.

The seriousness of this impediment is aggravated by the fact that the very possibility that different boards may reach different decisions will cause parties, if they have a choice between boards, to take their case to the one whose decisions they anticipate will be the more favorable. Whether they resort to federal or to state authority is not likely to depend on the character of the employer's business, or its relation to interstate commerce, but solely on an evaluation of which body is likely to be more hospitable to their particular interests. If a union or employer (where an employer can invoke the services of the board) believes it will fare better before a state board—whether because of differences in the statute, the administrative policy, the presence or absence of superior fact-finding facilities, or the attitude or philosophy of the personnel—it will file its charges there, with the deliberate intention to obtain a decision which would not be reached by the National Board. It is necessary to go no further than these cases to illustrate this. Although all other representation proceedings at the appellants' plants have been

handled by the National Board, the foremen's organization went to the State Board because it knew that the National Board would dismiss its petition. Each of the examples described above (*supra*, pp. 52–53) affords an additional illustration of situations in which parties might be inclined to "shop around" for the more favorable Board.

As Mr. Justice Higgins stated a number of years ago with respect to a comparable situation in Australia [80]:

> At present, the unions are only too apt to treat the state and federal courts as competing shops, and they resort to the shop which is likely to grant them the most.

How unwholesome that situation is was pointed out sharply in the testimony of National Board Chairman Herzog on the Case Bill. Discussing duplication of function on the Federal level he said (Hearings, Senate Committee on Education and Labor, on H. R. 4908, 79th Cong., 2d Sess., p. 290):

> I do not think * * * that it either enhances the dignity or the effectiveness of the Government of the United States to make it easy for employers or labor unions to shop around among agencies, in search of the one that is most likely to support their views. The surest way to avoid this

[80] Higgins, *A New Province for Law and Order*, 34 Harv. L. Rev. 105, 132 (1920).

danger is to preclude duplication of function.

The confusion which must inevitably result from dispersion of authority is the very thing which, as we shall show, Congress deliberately sought to avoid.

Although a decision of the National Board in a particular case will, of course, supersede any prior state ruling, this power of supersedure is insufficient to prevent the practice of "shopping around" to which we have referred. For the National Board acts on questions concerning representation or alleged unfair labor practices only when petitions or charges are filed with it. In some situations, as where there are competing unions, an opposing party might bring to the National Board a case which had been previously submitted to a state agency. But, as in the present cases, there may be no one in a position to do this, with the result that although the National Board may be aware that a state board is reaching a decision which it believes improper, there is nothing it can do to remedy the situation. The consequence then is that a party has his choice of forum, and that a state decision which the National Board would not have reached can not be disturbed.

Furthermore, it is apparent that the power of the National Board to issue a superseding order does not remedy the confusion in labor relations which ensues when a case which would otherwise

be taken to the National Board is first brought before a state agency for the purpose of obtaining a different decision. Even if that case subsequently be presented to the National Board, the passage of time, with the resultant continuance of an unsettled state of affairs in a plant, impairs the accomplishment of the objectives of the National statute.

Moreover, uniformity of application is particularly essential to the effectuation of Federal policy in the large interstate industries over which the National Board continuously exercises jurisdiction, such as the one involved in the instant cases. For such an industry serves national markets, and maintenance of competitive conditions requires that regulation in the field of labor relations be uniformly applied. Single companies may have plants in many States and employees of such companies may all belong to a single labor organization and be covered by a single collective bargaining agreement. To permit variations in the rights and obligations of the parties in matters covered by Federal law merely because of variations in the local policies of the several states wherein they happen to reside or be employed would result in the discrediting of national policy and in the burdening of its administration with discrepancies wholly unrelated to the national objectives.

For these reasons we believe that, for those industries which the Board is regulating, to permit

the states to enforce their own regulation of the same aspects of labor relations interferes with and lessens the effectiveness of the administration and enforcement of the National Act.

3. The language and history of the National Act

The language and legislative history of the National Act support the position that Congress meant to create a body having exclusive and not merely concurrent authority.

Section 10 (a) gives the Board exclusive authority to administer the Act in all situations coming within its purview. It provides:

> The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall be exclusive, and shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, code, law, or otherwise.

This grant of "exclusive" power to the National Board to prevent any person (covered by the Act) from engaging in unfair labor practices, is on its face a conclusive declaration that no other agency, by whatever sovereignty constituted, may perform the functions lodged with the Board. Compare *Amalgamated Utility Workers* v. *Consolidated Edison Co.*, 309 U. S. 261.

The Senate Committee, in explaining the necessity for such a grant of power, commented as fol-

lows on the then existing situation respecting the application and enforcement of Section 7 (a) of the National Industrial Recovery Act, for which the National Labor Relations Act was to be substituted (S. Rep. No. 573, 74th Cong., 1st Sess., pp. 4–5):

> (3) *Excessive diffusion of administrative responsibility.*—Today a wide variety of independent industrial boards, from 13 to 15 in number, are entrusted with the administration of section 7 (a). The present National Labor Relations Board has no appellate jurisdiction over any board established pursuant to an industrial code, either in respect to findings of fact or interpretations of law. And as there are now over a hundred codes which make some provisions for the creation of such boards, it could be only a matter of time until this diffusion of authority would reach extraordinary proportions.
>
> None of these boards has any actual power within itself to enforce section 7 (a). And even if such power could be granted wisely to a multitude of agencies, these boards are unsuited to the purpose. Largely bipartisan in character, they live in an atmosphere of conciliation and compromise that may be admirably suited to the settlement of wage and hour disputes where shifting standards must be applied to variegated local needs. ***But section 7 (a) is a uniform national policy established by law of Congress. As such it must receive uniform interpretation***

> *everywhere;* it must be enforced by a judicial process rather than broken by compromise; and its enforcement must reside with governmental rather than with quasi-private agencies. [Italics supplied.]

The House Committee likewise referred to the detrimental effects which had resulted from "the diffusion of responsibility and conflicting interpretations in regard to Section 7 (a)." H. Rep. No. 1147, 74th Cong., 1st Sess., p. 9.

Section 10 (a) was designed to remedy this condition. The Senate Committee explained (S. Rep. No. 573, p. 15):

> Section 10 (a) gives the National Labor Relations Board exclusive jurisdiction to prevent and redress unfair labor practices, and, taken in conjunction with section 14, establishes clearly that this bill is paramount over other laws that might touch upon similar subject matters. Thus it is intended to dispel the confusion resulting from dispersion of authority and to establish a single paramount administrative or quasi-judicial authority in connection with the development of Federal American law regarding collective bargaining.

It is true, of course, that Section 10 (a) and these comments of the Committee concerning it, were directed at the diffusion of responsibility which had up to that point existed on the Federal level. There had been no experience with diffusion resulting from state action, for prior to

the passage of the National Labor Relations Act, the states had not entered the field covered by Section 7 (a).[31] But it does not follow from this that the grant of exclusive jurisdiction to the National Board in Section 10 (a) refers only to its jurisdiction in relation to other Federal agencies, and that reference in that Section to the supersedure of other "laws" connotes only Federal laws. Neither the Board nor this Court has so interpreted the Section. See *Matter of Eppinger & Russell Co.*, 56 N. L. R. B. 1259, referred to with approval in *Hill* v. *Florida*, 325 U. S. 538, 542; compare *Amalgamated Utility Workers* v. *Consolidated Edison Co.*, 309 U. S. 261, 267–269.[32]

This conclusion that Congress intended in Section 10 (a) to exclude state as well as Federal agencies from the field is confirmed by the fact that the Section reflects Congressional concern over the detrimental effects of dispersion of authority. In the face of its declarations that it

[31] There is one possible exception to this statement. In 1931, Wisconsin enacted statutes declaring that it was the public policy of the State to favor collective bargaining and non-interference by employers in self-organizational activity. Wis. Stats. (1933), §§ 268.18, 133.07. In *Trustees of Wisconsin State Federation of Labor* v. *Simplex Shoe Mfg. Co.*, 215 Wis. 623, 256 N. W. 56, the Wisconsin Supreme Court held that this statute created legal rights enforceable by injunction against employer interference.

[32] See also, *Matter of Twin City Milk Producers Ass'n*, 61 N. L. R. B. 69; *Matter of Northern States Power Co.*, 37 N. L. R. B. 991; *Matter of Rock River Woolen Mills*, 18 N. L. R. B. 828.

desired to establish "a single paramount administrative or quasi-judicial authority" in connection with the development of collective bargaining law on a national level (*supra*, p. 60), and that it intended the National Act to be paramount over all other laws which might touch on even "similar" subject matters (*id.*), it is highly unlikely that Congress would have been inclined to open the door to intrusions by state authorities which it closed to intrusions by Federal authorities. The considerations which convinced the Congress of the undesirability of permitting more than one Federal agency to operate in this field are applicable, of course, to an even greater degree, to the exercise of authority by the 48 States.

Nor does it follow, contrary to the view expressed by the New York Court of Appeals in the Davega case,[33] that because Section 10 (a) speaks only in terms of the Board's power to enforce and administer the National Act, and not in terms of the applicability of the Act itself, state agencies remain free to perform the very

[33] *Davega City Radio, Inc.* v. *New York State Labor Relations Board*, 281 N. Y. 13, 22 N. E. 2d 145. It may be noted that pursuant to the understanding between the National and the State Boards (see pp. 71–77, 91–106, *infra*), cases involving the retail stores operated by Davega would have been handled only by the latter. Indeed in the *Davega* case the Court of Appeals noted that "the record shows that the appellant was informed by the Regional Director of the National Board, albeit not by formal order, that the Board would not assume jurisdiction." 281 N. Y. at 24, 22 N. E. 2d at 149.

functions and decide the very question which Congress entrusted exclusively to the National Board, as long as the state agencies operate under the guise of interpreting state statutes rather than the National Act. See 281 N. Y. 13, 24, 22 N. E. 2d 145, 148–149; see also the decision of the Wisconsin Supreme Court in *Wisconsin L. R. B.* v. *Rueping Leather Co.*, 228 Wis. 473, 483–484, 279 N. W. 673, 677–678. Section 10 (a) specifically declares that the Board's exclusive power is not to be affected by any other machinery established by "law"—which obviously means other laws, and would seem to include state laws. The suggested construction would plainly interfere with the centralized administration, uniform interpretation, and unitary responsibility which Congress avowedly sought to achieve through the enactment of Section 10 (a). As we have shown, pp. 49–58, *supra*, this has been in practice the result of application of these views by agencies administering state acts similar to the Wagner Act.

The one Section of the Act which in terms refers to "local agencies," empowers the Board to "utilize" such agencies in the course of performing its functions under the Act (Section 4 (a)). If any implication can be drawn from this language, it would be that local agencies can enter the field only if their services are "utilized" by the Board.

We do not believe that the peculiar problem presented by the industries not reached by the Board, discussed in Point II A, *infra*, pp. 66–77, warrants not giving Section 10 (a) the meaning Congress intended it to have with respect to the mass of industries whose labor relations are governed by the National Board. If Sections 10 (a) and 4 (a) are read together the Board can be said to be exercising its authority by utilizing the services of local boards when it refuses to assert its authority in cases over which it has Commerce Clause jurisdiction and remits the petitioning party to his rights and remedies before a State Board. For while it would seem that Congress did not intend to permit state authority to operate independently of Federal authority in the field covered by the National Act, the provision which empowers the Board to utilize the services of local agencies would seem to sanction the National Board's practice of in effect remitting to state boards cases in borderline industries which for budgetary reasons the National Board is unable to handle. See pp. 66–71, *infra*.

There are other indications that Congress did not intend to allow state boards to exercise concurrent jurisdiction with the National. The problem of employee fraud and violence was deliberately left to the states to control. S. Rep. No. 573, 74th Cong., 1st Sess., p. 16. *Allen-Bradley Local* v. *Wisconsin Employment Relations Board*,

315 U. S. 740. It had also been suggested that the National Act should deal with the question of the legality of closed shop contracts beyond mere illegalization of such contracts if executed with employer-assisted or dominated labor organizations, or with minority unions (Section 8 (3)). Compare *National Labor Relations Board* v. *Electric Vacuum Cleaner Co.*, 315 U. S. 685. The Congressional Committee rejected this suggestion on the stated ground that Congress did not desire to interfere "with the laws of the several States on this subject." S. Rep. No. 573, 74th Cong., 1st Sess., pp. 11–12; H. Rep. No. 1147, 74th Cong., 1st Sess., pp. 19–20.

These specific statements by the Congressional Committees that the failure of the statute to cover certain subjects in the general field with which the legislation dealt was not to be deemed to preclude state regulation of those untouched subjects strongly suggest that in regard to those matters which were covered in the statute Congress intended to preclude state control entirely. This inference is further supported by the fact that, in contrast to other contemporary legislation, the National Act contains no clause declaring that state laws bearing on the same subject matter shall not be abrogated. See, e. g., Securities Act of 1933, Sec. 18, 48 Stat. 74, 85, 15 U. S. C., Sec. 77r; Securities Exchange Act of 1934, Sec. 38, 48 Stat. 881, 903, 15 U. S. C. Sec. 78bb. Cf. Fair Labor Stand-

ards Act, Sec. 18, 52 Stat. 1060, 1069, 29 U. S. C. Sec. 218."

II

THE PRACTICAL PROBLEM CONFRONTING THE BOARD

For the reasons heretofore stated, we submit that the Board's authority over such an interstate industry as is here involved is exclusive. It is not necessary to go further in order to dispose of these cases. Nevertheless, in order that the Board's position and practice may be made entirely clear to the Court, it seems desirable to refer to the Board's policy in other types of industries, and to the manner in which, outside of the present cases, it has worked out an arrangement with the New York Board for avoiding overlapping or duplication. This practical adjustment, we think, suggests a reasonable solution to the problem of concurrent authority.

A. THE CASES WHICH THE NATIONAL BOARD DOES NOT HANDLE

We have stated what we believe to be the unsettling effect of a concurrent state and Federal

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[34] While it is true that at the time of the passage of the Act there were no state laws like the National Labor Relations Act (but see note 31, p. 61, *supra*) which would be directly affected by the presence or absence of a savings clause, this fact does not wholly vitiate the effect of its omission. For, as we have indicated above, Congress was aware of, and concerned with, the relation of the National Act to state power in the field and made a deliberate choice as to "what matters [were] to be taken over by the central Government and what to be left to the States." *Polish National Alliance* v. *National Labor Relations Board*, 322 U. S. 643, 647.

jurisdiction over labor relations. That discussion presupposed that the National Board was actively exercising its authority, as it does in the major interstate industries and in most fields subject to its jurisdiction. The National Board does not, however, handle all cases which are subject to its constitutional jurisdiction under the Commerce Clause. It makes a selection among the cases which are filed with it.

We are not concerned here with cases which the Board turns down because it regards them as insubstantial on the merits, or because it has a substantive policy against granting relief in a particular type of situation. Apart from these, there are cases in which the Board does not even inquire into the merits, but which it nevertheless refuses to entertain. In some of these cases, of course, the Board may feel it lacks power under the Commerce Clause. These clearly fall within the jurisdiction of the states, and they present no problem here. There are other cases, which may be said to fall on the border line of commerce jurisdiction, which the Board does not take although it does not disclaim authority over them. And there are other cases which the Board refuses to handle which do come within its constitutional power, although these are generally closer to the constitutional boundary than the cases which the Board customarily hears.

The necessity for this abnegation is in large part budgetary. With the appropriations avail-

able to it there has always been a limit to the case load which the Board can handle. In deciding what cases shall be heard, the Board lays down no hard and fast rule, but is guided by its judgment as applied to each situation which comes before it. Its judgment is not arbitrary, however, but is exercised in a manner which it thinks will best accomplish the purposes of the Act. The Board regards these purposes as best effectuated by applying the Federal Act to the industries most clearly covered by it, which engage in interstate commerce on a large scale, and on occasion to particular businesses with respect to which labor disturbances resulting from violations of the Act would obstruct the flow of interstate commerce substantially. In general—and it is not simple to generalize—it can be said that the Board will tend to refuse cases as to which it has doubts of its constitutional jurisdiction, or, even though constitutional jurisdiction is not in question, which are primarily of local significance.

The line may not be drawn entirely on an industry basis. Where interference with the operation of the local transit company in Baltimore was thought to affect interstate and foreign commerce substantially the Board took the case,[35] although it has both previously and subsequently turned down cases with respect to other transit companies. The Board might also take into ac-

[35] *National Labor Relations Board* v. *Baltimore Transit Co.*, 140 F. 2d 51 (C. C. A. 4), certiorari denied, 321 U. S. 795.

count in making a choice the fact that the policy of the National statute would be enforced under a state law—a factor which this Court has indicated is entirely appropriate for the Board to consider. *Consolidated Edison Co.* v. *National Labor Relations Board*, 305 U. S. 197, 223. There would be less reason to apply the National Act in that circumstance than otherwise.

In this field in which the National Board can but does not take jurisdiction, it is obviously more consonant with the policy of the National statute to permit enforcement of state laws embodying the same policy than to leave the employees' rights without any statutory protection. This justifies excepting this field from the otherwise exclusive grant of authority to the Board in Section 10 (a). See pp. 58–66, *supra*. The friction, confusion and uncertainty arising from the application of dual controls, to which we have referred, are nonexistent where the National Board will not exercise its jurisdiction. The National Board accordingly believes that the mere existence of the National statute should not deprive the states of power to apply a similar policy to employers over whom the National Board does not take jurisdiction.

Since the states may take jurisdiction, however, only if the National Board declines to apply the National Act to the enterprise involved, a showing of such refusal to take jurisdiction by the National Board is a prerequisite to the assertion of jurisdiction by the states. This does not necessarily mean

that a petition or charge must be filed with the National Board in each individual case. The National Board may announce a general policy of declining jurisdiction in an entire class of cases. (See, for example, the National Board's declaration as to New York brokerage houses, pp. 75–76, *infra;* and the over-all agreement between the National and New York Boards as to which cases shall be handled by each, pp. 71–75, *infra.*) In such cases the National Board's announcement of general policy is itself adequate to justify the initiation of proceedings before the State Board. Where no such policy is in effect and the National Board accepts or declines jurisdiction on a case-to case basis, assertion of jurisdiction by State Boards must await rejection of jurisdiction by the National Board with respect to a specific petition or charge.[36]

[36] Under new Rules and Regulations adopted by the National Board, pursuant to the requirements of the Administrative Procedure Act (Pub. No. 404, 79th Cong., 2d Sess., § 6 (a)), the Board will make clear whether its refusal to proceed is based on its decision not to apply the National Act to the particular enterprise, thereby permitting the State Board to proceed in the case, or whether its refusal is predicated on other considerations, such as lack of merit, which would bar State action. See National Labor Relations Board, Rules and Regulations, Series 4, effective September 11, 1946, sections 203.15, 203.57, 11 F. R. No. 177-A, pp. 607, 613, providing that reasons shall be briefly stated when the Board dismisses a petition or charge. Even before these Rules and Regulations were adopted it was always possible for the parties or State authorities to ascertain the reasons for the National Board's refusal to proceed by making inquiry to the National Board. See, for example, note 33, p. 62, *supra;* and p. 8, *supra.*

The *Davega* and *Rueping* decisions, which support the State's general concurrent jurisdiction (*supra*, pp. 62–63), seem to be in part at least motivated by the concern of the New York and Wisconsin courts that the establishment of any rule other than one permitting concurrent jurisdiction would "create a twilight zone, in which [an employer] may disobey its plain duty, required by both statutes, upon the pretext that its conduct is dictated by the other statute". See 281 N. Y. at 24, 22 N. E. 2d at 149; 228 Wisc. at 491, 279 N. W. at 679–680. But the rule we suggest—to wit, that where cases are subject to the jurisdiction of the National Board the states may act only when the National Board indicates that it will decline to assume jurisdiction over the particular case or class of cases—eliminates the possibility of such a twilight zone, while at the same time eliminating duplication of function, dispersion of authority, division of responsibility, and the inevitable litigation which would result if the state agencies could exercise a general concurrent jurisdiction.

B. THE UNDERSTANDING WITH THE NEW YORK BOARD

The position of the National Board is shown by the understanding in effect between the National and the New York boards since 1937. On July 12 of that year, after a conference, Chairman Boland of the New York Board outlined the understanding reached in a letter to Chairman

Madden of the National Board. The letter (printed *infra*, pp. 103–105) stated, *inter alia*,

> Unless there are unusual circumstances, the New York State Labor Relations Board will assume jurisdiction over all cases arising in the following trades and industries, without clearing, except as a matter of record, with the National Board's officials:
>
> 1. Retail stores,
> 2. Small industries which receive all or practically all raw materials from within the State of New York, and do not ship any material proportion of their product outside the State,
> 3. Service trades (such as laundries),
> 4. Office and residential buildings,
> 5. Small and clearly local public utilities, (This includes local traction companies, as well as gas and electric light corporations.)
> 6. Storage warehouses,
> 7. Construction operations,
> 8. Other obviously local businesses.

With respect to "concurrent jurisdiction" the letter stated that "we assume that even a tentative understanding must await mutual study of the memorandum which Mr. Fahy is now preparing."

The matter was reexamined, in conference between representatives of the two boards, in 1945, as a consequence of the action of the State Board in taking jurisdiction over the petitions of supervisory employees in "large interstate manufac-

turing establishments". A memorandum prepared by General Counsel Alvin J. Rockwell of the National Board (printed in full, *infra*, pp. 92–103), which General Counsel Grady of the State Board considered "a fair statement of the proceedings" (see Mr. Grady's letter, *infra*, p. 91), referred to Chairman Boland's letter of July 12, 1937, and amplified the understanding therein described. With respect to the problem of concurrent jurisdiction it was noted that no memorandum on the subject had been prepared and no subsequent understanding reached. The memorandum then goes on (*infra*, p. 101):

> * * * In practice, this does not seem to have been a problem, except in the situation discussed below, since the State Board has by and large confined its activities to the businesses detailed in the letter of July 12 and the National Board in turn has left this field open to the State Board. The problem of so-called "concurrent jurisdiction" has arisen in recent months because, following the National Board's decision in *Matter of Maryland Drydock Company*, 49 N. L. R. B. 733, a number of labor organizations have filed election petitions with the State Board which they knew would not be entertained by the National Board. (See the second paragraph of this memorandum, above, concerning the conference of January 9, 1945, in Washington.) Prior to the *Maryland Drydock* case, the State

> Board, it is understood, had refrained from entertaining cases involving large interstate manufacturers and the National Board had asserted exclusive jurisdiction over such employers.

The Boards disagreed, however (*infra*, p. 102), as to whether the State Board should

> * * * entertain election petitions for units of supervisory employees where it was doubtful whether the National Board would proceed with the case were it filed with the latter Board.
>
> * * * * * * *
>
> * * * no broad understanding was reached on this score, both Boards reserving their respective positions * * *.

As a matter of general policy, however (*infra*, p. 96)—

> * * * The position was repeatedly expressed by the representatives of both National and State Boards that as a working matter the jurisdiction between the two Boards must be allotted on the basis of the type of industry or business involved (rather, for example, than on the basis of which Board a petition or charge is initially filed with), and that when one Board, pursuant to common understanding, has asserted jurisdiction in the past over a particular employer, the other Board should thereafter refer any matters coming to it to the Board which had entertained the earlier case or cases.

It thus appears that apart from the supervisory employee problem involved in the cases at bar, the two Boards had arrived at an understanding whereby the State Board did not exercise jurisdiction over those industries regulated by the National Board, and the National Board recognized the propriety of state proceedings in local industries which it did not attempt to reach.

The problem arose again in August 1946, when employees of a brokerage house in New York City invoked the jurisdiction of the National Board. The National Board thereupon entered a minute in its record (set forth, *infra*, pp. 105–106), that

> * * * The Board concluded that it would not, at this time, entertain a petition filed on behalf of the employees of Harris Upham and Company or other such brokerage houses because of budgetary and other administrative considerations. The Board further concluded that, in view of this disposition, it had no objection to having the State Labor Relations Board of the State of New York entertain such petitions filed under the State Act.

Subsequently when the employer, claiming that it was subject only to the National authority, challenged the jurisdiction of the New York Board, this minute was read into the record of the State Board proceedings by a representative

of the National Board.[37] The State Board, in taking jurisdiction of the case, relied in part upon the expression of the National Board's views.

We think the practical approach to the problem of concurrent jurisdiction by the New York and National Boards points the way to the proper solution of the constitutional problem.

Both Boards seem to have agreed that jurisdiction between them must in general be allotted "on the basis of the type of industry or business involved (rather, for example, than on the basis of which Board a petition or charge is initially filed with)," and that only one board should exercise jurisdiction "over a particular employer." See *supra*, p. 74. Thus the Boards have implicitly recognized that it is unsatisfactory to allow national and state agencies to exercise concurrent jurisdiction over the same employer. The unexpressed reason underlying this conclusion, we surmise, was the need for avoiding the confusion and interference which we have described earlier in this brief, and which the Boards, we believe, agree will impair the operation of the Labor Relations Acts. And the Boards have so divided the field as to leave to the National agency the interstate industries, while leaving some local borderline situations to the State. The

[37] New York State Labor Relations Board, *Matter of Harris, et al.*, Decision No. 3683, August 30, 1946, 18 L. R. R. M. 1384.

result is that interstate industries over which the National Board has consistently taken jurisdiction are not to be touched by the State, but that where the National Board does not exercise its jurisdiction, the State may act.

We believe this disposition of the problem to be most consistent with the policy of the national statute, and with the intention of Congress that that policy be effectuated. We accordingly conclude that the National Act does supersede the application of state laws—whether the same or different—for those industries over which the National Board exercises authority.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that the judgments of the courts below should be reversed.

GEORGE T. WASHINGTON,
Acting Solicitor General.

ROBERT L. STERN,
Special Assistant to the Attorney General.

GERHARD P. VAN ARKEL,
General Counsel,

MORRIS P. GLUSHIEN,
Associate General Counsel,

MOZART G. RATNER,
Attorney,
National Labor Relations Board.

OCTOBER 19[illegible].

APPENDIX A

The pertinent provisions of the National Labor Relations Act (Act of July 5, 1935, 49 Stat. 449, 29 U. S. C. 151 *et seq.*) are as follows:

SECTION 1. The denial by employers of the right of employees to organize and the refusal by employers to accept the procedure of collective bargaining lead to strikes and other forms of industrial strife or unrest, which have the intent or the necessary effect of burdening or obstructing commerce by (a) impairing the efficiency, safety, or operation of the instrumentalities of commerce; (b) occurring in the current of commerce; (c) materially affecting, restraining, or controlling the flow of raw materials or manufactured or processed goods from or into the channels of commerce, or the prices of such materials or goods in commerce; or (d) causing diminution of employment and wages in such volume as substantially to impair or disrupt the market for goods flowing from or into the channels of commerce.

The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contact, and employers who are organized in the corporate or other forms of ownership association substantially burdens and affects the flow of commerce, and tends to aggravate recurrent business depressions, by depressing wage rates and the purchasing power of wage earners in industry and by preventing the stabilization of competi-

tive wage rates and working conditions within and between industries.

Experience has proved that protection by law of the right to employees to organize and bargain collectively safeguards commerce from injury, impairment, or interruption, and promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest, by encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions, and by restoring equality of bargaining power between employers and employees.

It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

* * * * *

SEC. 2. When used in this Act—

* * * * *

(2) The term "employer" includes any person acting in the interest of an employer, directly or indirectly, but shall not include the United States, or any State or political subdivision thereof, or any person subject to the Railway Labor Act, as amended from time to time, or any labor organization (other than when acting as an

employer), or anyone acting in the capacity of officer or agent of such labor organization.

(3) The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse.

* * * * *

(6) The term "commerce" means trade, traffic, commerce, transportation, or communication among the several States, or between the District of Columbia or any Territory of the United States and any State or other Territory, or between any foreign country and any State, Territory, or the District of Columbia, or within the District of Columbia or any Territory, or between points in the same State but through any other State or any Territory or the District of Columbia or any foreign country.

(7) The term "affecting commerce" means in commerce, or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce.

* * * * *

SEC. 4. (a) * * * * * *

The Board may establish or utilize such regional, local, or other agencies, and utilize such voluntary and uncompensated services, as may from time to time be needed.

* * * * * *

SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection.

SEC. 8. It shall be an unfair labor practice for an employer—

(1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7.

(2) To dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: *Provided,* That subject to rules and regulations made and published by the Board pursuant to section 6. (a), an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay.

(3) By discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided,* That nothing in this Act, or in the National Industrial Recovery Act (U. S. C., Supp. VII, title 15, secs. 701–712), as amended from time to time, or in any code or agreement approved or prescribed thereunder, or in any other statute

of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in this Act as an unfair labor practice) to require, as a condition of employment membership therein, if such labor organization is the representative of the employees as provided in section 9 (a), in the appropriate collective bargaining unit covered by such agreement when made.

(4) To discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this Act.

(5) To refuse to bargain collectively with the representatives of his employees, subject to the provisions of Section 9 (a).

* * * * *

SEC. 9. (a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: *Provided,* That any individual employee or a group of employees shall have the right at any time to present grievances to their employer.

(b) The Board shall decide in each case whether, in order to insure to employees the full benefit of their right to self-organization and to collective bargaining, and otherwise to effectuate the policies of this Act, the unit appropriate for the purposes of collective bargaining shall be the em-

ployer unit, craft unit, plant unit, or subdivision thereof.

(c) Whenever a question affecting commerce arises concerning the representation of employees, the Board may investigate such controversy and certify to the parties, in writing, the name or names of the representatives that have been designated or selected. In any such investigation, the Board shall provide for an appropriate hearing upon due notice, either in conjunction with a proceeding under section 10 or otherwise, and may take a secret ballot of employees, or utilize any other suitable method to ascertain such representatives.

* * * * *

SEC. 10. (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall be exclusive; and shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, code, law, or otherwise.

* * * * *

SEC. 14. Wherever the application of the provisions of section 7 (a) of the National Industrial Recovery Act (U. S. C., Supp. VII, title 15, sec. 707 (a)), as amended from time to time, or of section 77B, paragraphs (l) and (m) of the Act approved June 7, 1934, entitled "An Act to amend an Act entitled 'An Act to establish a uniform system of bankruptcy throughout the United States' approved July 1, 1898, and Acts amendatory thereof and supplementary thereto" (48 Stat. 922, pars. (l) and (m)), as amended from time to time,

or of Public Resolution Numbered 44, approved June 19, 1934 (48 Stat. 1183), conflicts with the application of the provisions of this Act, this Act shall prevail: *Provided,* That in any situation where the provisions of this Act cannot be validly enforced, the provisions of such other Acts shall remain in full force and effect.

APPENDIX B

The pertinent provisions of the New York State Labor Relations Act (New York Laws of 1937, Chapter 443, as amended by the New York Laws of 1942, Chapter 518; 30 McKinney's Consolidated Laws of New York §700–716) is as follows:

SEC. 700. FINDINGS AND POLICY.—The economic necessity for employees to possess full freedom of association, actual liberty of contract and bargaining power equal to that of their employers, who are frequently organized in corporate or other forms of association, has long been sanctioned by public opinion, and recognized and affirmed by legislatures and the highest courts. As the modern industrial system has progressed, there has developed between and among employees and employers an ever greater economic interdependence and community of interest which have become matters of vital public concern. Employers and employees have recognized that the peaceable practice and wholesome development of that relationship and interest are materially aided by the general adoption and advancement of the procedure and practice of bargaining collectively as between equals. It is in the public interest that equality of bargaining power be established and maintained. It is likewise recognized that the denial by some employers of the right of employees freely to organize and the resultant refusal to accept the procedure of collective bargaining, sub-

stantially and adversely affect the interest of employees, other employers, and the public in general. Such denial creates variations and instability in competitive wage rates and working conditions within and between industries and between employees and employers engaged in such industries, and by depressing the purchasing power of wage earners and the profits of business, and tends (a) to produce and aggravate recurrent business depressions, (b) to increase the disparity between production and consumption, (c) to create unemployment with its attendant dangers to the health, peace and morale of the people, and (d) to increase public and private expenditures for relief of the needy and the unemployed.

When some employers deny the right of employees to full freedom of association and organization, and refuse to recognize the practice and procedure of collective bargaining, their actions lead to strikes, lockouts and other forms of industrial strife and unrest which are inimical to the public safety and welfare, and frequently endanger the public health.

Experience has proved that protection by law of the right of employees to organize and bargain collectively, removes certain recognized sources of industrial strife and unrest, encourages practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours or other working conditions, and tends to restore equality of bargaining power between employers and employees, thereby advancing the interests of employers as well as employees.

In the interpretation and application of this article, and otherwise, it is hereby

declared to be the public policy of the state to encourage the practice and procedure of collective bargaining, and to protect employees in the exercise of full freedom of association, self-organization and designation of representatives of their own choosing for the purposes of collective bargaining, or other mutual aid and protection, free from the interference, restraint or coercion of their employers.

All the provisions of this article shall be liberally construed for the accomplishment of this purpose.

This article shall be deemed an exercise of the police power of the state for the protection of the public welfare, prosperity, health and peace of the people of the state.

SEC. 701. DEFINITIONS.

* * * * *

2. The term "employer" includes any person acting on behalf of or in the interest of an employer, directly or indirectly, with or without his knowledge, but a labor organization or any officer or agent thereof shall only be considered an employer with respect to individuals employed by such organization.

3. The term "employees" includes but is not restricted to any individual employed by a labor organization; any individual whose employment has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment; and shall not be limited to the employees of a particular employer, unless the article explicitly states otherwise, but shall not include any individual employed by his parent or spouse or in

the domestic service of any person in his home, or any individuals employed only for the duration of a labor dispute, or any individuals employed as farm laborers.

* * * * *

SEC. 703. RIGHTS OF EMPLOYEES.—Employees shall have the right of self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection, free from interference, restraint, or coercion of employers, but nothing contained in this article shall be interpreted to prohibit employees from exercising the right to confer with their employer at any time, provided that during such conference there is no attempt by the employer, directly or indirectly, to interfere with, restrain or coerce employees in the exercise of the rights guaranteed by this section.

SEC. 704. UNFAIR LABOR PRACTICES.

* * * * *

6. To refuse to bargain collectively with the representatives of employees, subject to the provisions of section seven hundred five.

* * * * *

SEC. 705. REPRESENTATIVES AND ELECTIONS.—1. Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes or by the majority of the employees voting in an election conducted pursuant to this section shall be the exclusive representatives of all the employees in the appropriate unit for the purposes of collective bargaining in

respect to rates of pay, wages, hours of employment, or other conditions of employment: Provided, that employees, directly or through representatives, shall have the right at any time to present grievances to their employer.

2. The Board shall decide in each case whether, in order to insure to employees the full benefit of their right to self-organization, to collective bargaining and otherwise to effectuate the policies of this article, the unit appropriate for the purposes of collective bargaining shall be the employer unit, multiple employer unit, craft unit, plant unit, or any other unit; provided, however, that in any case where the majority of employees of a particular craft shall so decide the board shall designate such craft as a unit appropriate for the purpose of collective bargaining.

3. Whenever it is alleged by an employee or his representative, or by an employer or his representative, that there is a question or controversy concerning the representation of employees, the board shall investigate such question or controversy and certify in writing to all persons concerned the name or names of the representatives who have been designated or selected. In any such investigation the board shall provide for an appropriate hearing upon due notice, either in conjunction with a proceeding under section seven hundred six or otherwise, and may conduct an election by secret ballot of employees, or use any other suitable method to ascertain such representatives (either before or after the aforesaid hearing), provided, however, that the board shall not have authority to investigate any question or controversy between

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individuals or groups within the same labor organization or between labor organizations affiliated with the same parent labor organization.

* * * * *

SEC. 706. PREVENTION OF UNFAIR LABOR PRACTICES.—1. The Board is empowered and directed, as hereinafter provided, to prevent any employer from engaging in any unfair labor practice. This power shall not be affected or impaired by any means of adjustment, mediation or conciliation in labor disputes that have been or may hereafter be established by law.

* * * * *

SEC. 715. APPLICATION OF ARTICLE.—The provisions of this article shall not apply to the employees of any employer who concedes to and agrees with the board that such employees are subject to and protected by the provisions of the national labor relations act or the federal railway labor act * * *.

* * * * *

APPENDIX C

Documents Indicating Understanding Between the New York and the National Labor Relations Boards

NEW YORK STATE LABOR RELATIONS BOARD
250 West 57th Street
NEW YORK 19

WILLIAM E. GRADY, JR.
General Counsel

JULY 10, 1945.

ALVIN J. ROCKWELL, Esquire
General Counsel,
National Labor Relations Board,
Washington, D. C.

DEAR MR. ROCKWELL: The Board has examined your memorandum of our conference of April 20, 1945 and considers that it represents a fair statement of the proceedings.

As to insurance companies (page 6 of your memo), you will recall that we mentioned our prior experience with such companies and the fact that units of less than state-wide scope have been established and upheld by the courts. In such cases, therefore, we think it would be to the benefit of both Boards that you clear with us. A situation may very easily arise in which you would prefer to have us entertain a petition which had been filed with us.

Best regards.

Sincerely,

/s/ WILLIAM E. GRADY, JR.

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NATIONAL LABOR RELATIONS BOARD,
Washington 25, D. C, July 26, 1945.

WILLIAM E. GRADY, Jr.,
General Counsel,
New York State Labor Relations Board,
250 West 57th Street,
New York City 19, N. Y.

DEAR MR. GRADY: In Mr. Rockwell's absence on vacation this week, I am replying to your letter of July 10.

Mr. Rockwell's memorandum of our conference of April 20 and your letter were discussed with and approved by the Members of the Board.

We are, accordingly, circulating copies of this memorandum to the members of our staffs in the Buffalo and New York City offices. This memorandum and your letter will hereafter be followed as a guide in relations between the two Boards as regards cases arising in New York State.

Sincerely yours,

/s/ Oscar S. Smith
OSCAR S. SMITH,
Director of Field Division.

MEMORANDUM RE CONFERENCE BETWEEN REPRESENTATIVES OF NEW YORK STATE LABOR RELATIONS BOARD AND NATIONAL LABOR RELATIONS BOARD, HELD FRIDAY, APRIL 20, 1945

A conference was held at the offices of the New York State Labor Relations Board on Friday, April 20, 1945, attended by Father Kelley, Chairman, and Board Members Goldberg and Lorenz,

Executive Secretary Goldberg, General Counsel Grady, and Associate General Counsel Feldblum, of the New York State Labor Relations Board, and by Field Director Smith, New York Regional Director Howard LeBaron, General Counsel Rockwell, and New York Regional Attorney Perl, of the National Labor Relations Board. The subject of the conference was the proper division of jurisdiction between the National and State Boards.

This conference followed an earlier conference held on January 9, 1945, in Washington, between Messrs. Smith and Rockwell and Buffalo Regional Director Ryder, representing the NLRB, and Messrs. Goldberg and Feldblum, representing the New York Board. At the conference in Washington, the principal subject discussed was the action of the State Board in entertaining election petitions involving the employees of large interstate manufacturing establishments over which the National Board has customarily asserted jurisdiction. The cases in question related to petitions filed by labor organizations which sought to be certified as representatives of units of supervisory employees or, in one case, a labor organization which sought to represent non-supervisory employees but whose membership was composed of a substantial number of supervisors. At the time of the January conference, the Board's decision in the *Packard* case, 61 N. L. R. B., No. 3, had not been issued; it appeared that in certifying a labor organization for supervisory employees the State Board was taking action contrary to that which would have been taken

by the National Board had the petition been filed with it. It was also believed that the action of the State Board in proceeding to a certification of a labor organization for non-supervisory employees whose membership included supervisors in substantial number might be contrary to the National Board's disposition of the case under its decision in *Matter of Rochester & Pittsburgh Coal Co.*, 56 N. L. R. B. 1760. No understanding was reached with regard to these types of cases at the January conference. In the meantime, on March 26, 1945, the Board issued its decision in the *Packard* case, holding that it would proceed to certify unaffiliated unions as representative of supervisory employees and leaving open the question of whether it would proceed to certify affiliated unions as such representatives. The New York conference was arranged in order to discuss the types of cases which were the subject of the January conference and also to canvass in general the question of the respective jurisdictions of the two Boards.

The New York conference began with consideration of Father Boland's letter to Mr. Madden dated July 12, 1937, which has constituted the principal basis of understanding between the two Boards during the ensuing years. The Boland letter states:

> Unless there are unusual circumstances, the New York State Labor Relations Board will assume jurisdiction over all cases arising in the following trades and industries, without clearing, except as a matter of record, with the National Board's officials:
>
> 1. Retail stores.

2. Small industries which receive all or practically all raw materials from within the State of New York, and do not ship any material proportion of their product outside the State,
3. Service trades (such as laundries),
4. Office and residential buildings,
5. Small and clearly local public utilities, (This includes local traction companies, as well as gas and electric light corporations.)
6. Storage warehouses,
7. Construction operations,
8. Other obviously local businesses.

A copy of the letter of July 12, 1937, is attached to this memorandum.

At the time of the preparation of the letter of July 12 and the conference which preceded it and upon which it is based, there was relatively little case law as to the jurisdiction under the commerce clause of the National Board under the National Act. Since that time there has been a large number of decisions in the federal circuit courts of appeals and several in the Supreme Court which have substantially extended the Board's jurisdiction beyond that which was understood to exist in July 1937. To take only one pertinent example: In July 1937 the Board had not asserted jurisdiction over retail establishments. Since 1937 the Board has accepted a considerable number of cases involving retail establishments such as department stores and the Board's power in this respect has been sustained by the courts. Notwithstanding this extension of jurisdiction under the National Act, the National and State Boards, respectively, have, in general,

followed the understanding reflected by the letter of July 12, 1937. Thus, in New York State the National Board has not asserted jurisdiction over retail establishments. The representatives at the conference of April 20 expressed the view that, by and large, the understanding had worked out well as applied to the types of businesses there dealt with. The position was repeatedly expressed by the representatives of both National and State Boards that as a working matter the jurisdiction between the two Boards must be allotted on the basis of the type of industry or business involved (rather, for example, than on the basis of which Board a petition or charge is initially filed with), and that when one Board, pursuant to common understanding, has asserted jurisdiction in the past over a particular employer, the other Board should thereafter refer any matters coming to it to the Board which had entertained the earlier case or cases.[1]

Following reference to the letter of July 12, there was detailed discussion of the eight categories there listed, which are quoted above. The

[1] In *Consolidated Edison Co.* v. *N. L. R. B.*, 305 U. S. 197, 223, the Supreme Court indicated that in deciding whether or not to assert jurisdiction the National Board could properly take into account the existence of State protective legislation, such as the New York State Labor Relations Act.

The National Act contains no provision authorizing the National Board to enter into compacts or agreements with State Boards, but would seem to require the National Board in each case to exercise its discretion whether or not to proceed. It is believed, nevertheless, that understandings such as that embodied in the letter of July 12, 1937, although of no legal effect, assist both Boards in determining the proper disposition of particular cases as they arise.

gist of this discussion was as follows: *Retail stores.* Where the same company operates retail stores and also does a substantial interstate mail order business from within New York State, representatives of the National Board pointed out that probably the National Act should be applied to the company. The understanding was reached that before the State Board asserted jurisdiction in the future over any such companies, the case would be cleared with the National Board through the New York City or Buffalo offices, depending upon the region in which the case arose. *Service trades.* Where a New York concern is in the business of furnishing guards, window washers, laundry, or some other type of service within the State, it was felt that the business is essentially local in character and should be subject to the State Act even though the services are furnished to a number of large interstate enterprises, which in themselves are subject to the jurisdiction of the National Act. (An exception is the case of detective agencies doing business on a national scale, concerning which, it is understood, the State Board will clear with the National Board before asserting jurisdiction.) On the other hand, where the interstate enterprise, over which the National Board would customarily assert jurisdiction, supplies its own guard, window washing, laundry, or other service for itself, it was believed that the employees involved would rightly come within the jurisdiction of the National Act. The test here is whether the service is performed by a separate business establishment which can properly be considered a local

enterprise, even though services are rendered to interstate businesses, or whether the service is rendered by the interstate enterprise itself as an incident of its own business. *Office buildings.* The same test applicable to the service trades was also thought to be applicable to office buildings. Thus, if the employer involved is in the business of operating office buildings he is subject to the State Act even though tenants consist of interstate enterprises. On the other hand, where the office building is owned or operated, or both, by an interstate enterprise, over which the National Board would customarily assert jurisdiction, and is used by the interstate enterprise in conducting its interstate business, the National Board would expect to assert jurisdiction. *Public utilities.* It was agreed that the New York Board could properly assert jurisdiction over such utilities, including electric, gas, traction, bus companies, and the like which are not themselves engaged in supplying service across the State line. In short, where the National Board could only base its jurisdiction on the "affecting commerce" principle (plus the shipment into the State of fuel and capital equipment, not for resale), it was believed in general that the National Board could properly leave jurisdiction to the State Board. An exception to this working rule is provided by a few very large utilities, such as the Consolidated Edison Company, over which the National Board originally asserted jurisdiction. *Warehouses.* The test applied in the case of service trades and office buildings seems applicable to warehouses, the question being whether they are operated as separate local enterprises or as incidents of the

operation of interstate business over which the National Board would customarily take jurisdiction. *Construction business.* The New York Board is expected to assert jurisdiction over the construction industry except, for example, in the case of the construction of ships, which is thought of as falling within the field of manufacturing, over which, in general, the National Board asserts jurisdiction.

In addition to the foregoing lines of activity, referred to in the letter of July 12, 1937, two other businesses not dealt with in that letter were also discussed. *Insurance companies.* In the past both the State and the National Boards have intermittently asserted jurisdiction over insurance companies. So far as small insurance, bonding, casualty companies, etc., doing business primarily within the State are concerned, it was felt that the State Board should occupy this field. So far as the large national companies are concerned, however, the representatives of the National Board expressed the view that hereafter cases involving such companies should be handled by the latter Board. In this connection it was pointed out that as organization has matured among the large companies, State-wide and even larger units are being established and that this type of activity had therefore advanced to the stage where it was peculiarly the interest of the National Board. It was agreed that the State Board would not entertain any cases involving the large national companies without prior clearance with the National Board. *Newspapers.* The National Board has taken jurisdiction over large daily newspapers in New York and other States

and, where challenged, has been uniformly sustained in this by the courts. At the same time, the circulation departments of such newspapers, to the extent that the distributing activity is confined within a single State, are in many aspects local in character. In New York State, and particularly in New York City, where news vendors are subject to local licensing requirements, the National Board feels that cases involving the distribution of newspapers should properly be handled by the State Board. Consistent with this approach, the New York Regional Office of the National Board has recently referred to the State Board news vendor cases involving four of the largest afternoon newspapers in New York City. The representatives of the State Board expressed agreement with this approach and indicated that the proper line of division might come at the level of the circulation managers. It was agreed that hereafter neither Board will accept cases at the circulation manager level without prior clearance with the other Board; that cases above this level will be handled by the National Board; and that cases below this level will be handled by the State Board. Of course, small newspapers of limited circulation will properly be handled by the State Board.

Concurrent jurisdiction.[2] The letter of July 12, 1937, left open the question of "concurrent jurisdiction"—by which, it is understood, was meant the procedure to be followed in the case

[2] See *Davega-City Radio, Inc.* v. *New York Labor Relations Board*; 281 N. Y. 13; 22 N. E. 2nd 145; 4 L. R. R. Man. 899. (July 11, 1939.)

of employers who might simultaneously be subject to the requirements of both the State and National Acts. The letter stated: "So far as concurrent jurisdiction is concerned, we assume that even a tentative understanding must await mutual study of the memorandum which Mr. Fahy is now preparing." It appears that the memorandum referred to was never prepared and that no subsequent understanding was reached as to such concurrent jurisdiction. In practice, this does not seem to have been a problem, except in the situation discussed below, since the State Board has by and large confined its activities to the businesses detailed in the letter of July 12 and the National Board in turn has left this field open to the State Board. The problem of so-called "concurrent jurisdiction" has arisen in recent months because, following the National Board's decision in *Matter of Maryland Drydock Company*, 49 N. L. R. B. 733, a number of labor organizations have filed election petitions with the State Board which they knew would not be entertained by the National Board. (See the second paragraph of this memorandum, above, concerning the conference of January 9, 1945, in Washington.) Prior to the *Maryland Drydock* case, the State Board, it is understood, had refrained from entertaining cases involving large interstate manufacturers and the National Board had asserted exclusive jurisdiction over such employers.

At the conference of April 20 the representatives of the National Board pointed to the recent decision in the *Packard* case and suggested that

the State Board should adhere to its general policy of leaving all cases involving large manufacturing establishments doing interstate business to the National Board. The impracticability of both Boards intermittently asserting jurisdiction over the same employer was emphasized, and in addition the question was raised whether under the Federal Constitution the State Board could lawfully enforce any requirements against such employers which was inconsistent with or which imposed restraints in addition to those enforced by the National Board. The representatives of the New York Board agreed that cases of this type presented a legal problem but were of the view that it was advisable for the State Board to entertain election petitions for units of supervisory employees where it was doubtful whether the National Board would proceed with the case were it filed with the latter Board. The representatives of the New York Board pointed to their obligation to contribute to the maintenance of industrial peace within the borders of New York State and recalled a provision of the New York Constitution which guarantees organizational rights to all employees. The representatives of the latter Board agreed, however, that their officials should not reach out for cases of this character, involving large interstate manufacturers, and that they would keep the National Board advised as to all such cases they decided to entertain. Thus, no broad understanding was reached on this score, both Boards reserving their respective positions with regard to petitions for units of supervisory employees and other petitions involving large interstate manufacturers.

It was believed that it would be helpful to the work of both Boards if lists of cases entertained within the State were periodically exchanged. The details of this were left to be worked out.

NEW YORK STATE LABOR RELATIONS BOARD,
July 12, 1937.

Honorable J. WARREN MADDEN,
National Labor Relations Board,
Washington, D. C.

DEAR MR. MADDEN: We wish, in the first place, to thank you and your colleagues for your warm reception of last Wednesday. It is gratifying to know that we can look forward to such wholehearted cooperation from your Board and its staff. We will gladly reciprocate.

As requested, we outline our recollection of the understandings reached: So far as concurrent jurisdiction is concerned, we assume that even a tentative understanding must await mutual study of the memorandum which Mr. Fahy is now preparing.

Unless there are unusual circumstances, the New York State Labor Relations Board will assume jurisdiction over all cases arising in the following trades and industries, without clearing, except as a matter of record, with the National Board's officials:

1. Retail stores,
2. Small industries which receive all or practically all raw materials from within the State of New York, and do not ship any material proportion of their product outside the State,
3. Service trades (such as laundries),
4. Office and residential buildings,

5. Small and clearly local public utilities, (this includes local traction companies, as well as gas and electric light corporations).
6. Storage warehouses,
7. Construction operations,
8. Other obviously local businesses.

Clearance is certainly going to be required in the case of industries where the raw materials or most of them come from without the State, but the product is not shipped beyond the borders of New York. (The question here is as to the breadth of application of the "come to rest" doctrine of the *Schechter* case.)

You are familiar, of course, with Section 715 of our statute, part of which reads as follows: "Application of article. The provisions of this article shall not apply to the employees of any employer who concedes to and agrees with the board that such employees are subject to and protected by the provisions of the national labor relations act or the federal railway labor act . . .". The New York State Board will undoubtedly take the position that the words "agrees with" contemplate the necessity of our Board's agreeing with the employer that his employees are subject to the national statute, and that no employer can by unilateral action select his jurisdiction.

This however, does not solve all of the problems created by the Section, since it is clear that even the agreement of this Board with the employer will not necessarily bestow federal jurisdiction under the Constitution. Presumably every time such a concession is proffered by an employer,

our Board will have to clear with the National Board officials in the same way it would clear with them if no such concession were made.

It is our understanding that we should clear on all questions of jurisdiction with the Regional Directors in New York City and Buffalo in the first instance, and that you will instruct your Directors to reciprocate by clearing with us all doubtful cases which first come to their attention.

Whenever this Board and either of your Regional Directors find themselves unable to agree, the matter will be taken up with you at once.

We would appreciate knowing that your recollection and understanding of the above are in accord with our own.

Very sincerely yours,

John P. Boland

(Dr.) JOHN P. BOLAND, *Chairman.*

NATIONAL LABOR RELATIONS BOARD

MINUTES OF AUGUST 16, 1946

An informal inquiry was made to the Board by United Financial Employees Association asking whether the Board would entertain a Section 9 representation petition on behalf of the employees of Harris Upham and Company, a New York brokerage house. The Board was also advised that similar petitions were contemplated for the employees of a number of similar New York brokerage houses. The Board concluded that it would not, at this time, entertain a

petition filed on behalf of the employees of Harris Upham and Company or other such brokerage houses because of budgetary and other administrative considerations. The Board further concluded that, in view of this disposition, it had no objection to having the State Labor Relations Board of the State of New York entertain such petitions filed under the State Act.

Dated at Washington, D. C.
August 16, 1946.

Donn N. Bent
DONN N. BENT,
Executive Secretary.

Approved:
s/ P. M. H.
s/ J. M. H.

Certified to be a true and correct copy.

s/ Donn N. Bent,
DONN N. BENT,
Executive Secretary.

U. S. GOVERNMENT PRINTING OFFICE: 1946

Frankfurter o. 7

SUPREME COURT OF THE UNITED STATES

Nos. 55 and 76.—October Term, 1946.

Bethlehem Steel Company, et al., Appellants, v. New York State Labor Relations Board.	Appeal from the Court of Appeals of the State of New York.
The Allegheny Ludlum Steel Corp., Appellant, v. William J. Kelley and H. Myron Lewis, Constituting the State Labor Relations Board of the State of New York.	Appeal from the Supreme Court of the State of New York for the County of Chautauqua.

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76

[April 7, 1947.]

Mr. Justice Jackson delivered the opinion of the Court.

These appeals challenge the validity of the Labor Relations Act of the State of New York as applied to appellants to permit unionization of their foremen. Conflict is asserted between it and the National Labor Relations Act and hence with the Commerce Clause of the Constitution.

After enactment by Congress of the National Labor Relations Act, July 5, 1935, 49 Stat. 449, 29 U. S. C. § 151, *et seq.*, New York adopted a State Labor Relations Act following the federal pattern. Laws of New York, 1937, Chap. 443, 30 McKinney's Consolidated Laws of New York, §§ 700–716. In the administrative boards they create, the procedures they establish, the unfair labor practices prohibited, the two statutes may be taken for present purposes to be the same. But in provision for determination of units of representation for bargaining purposes, the

two Acts are not identical. Their differences may be made plain by setting forth § 9 (b) of the Federal Act, with that part which is omitted from the State Act in brackets and additions made by the State Act as amended, Laws of New York, 1942, Chap. 518, in italics:

> "The Board shall decide in each case whether, in order to insure to employees the full benefit of their right to self-organization [and] to collective bargaining, and otherwise to effectuate the policies of this Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, *multiple employer unit*, craft unit, plant unit, or [subdivision thereof] *any other unit; provided, however, that in any case where the majority of employees of a particular craft shall so decide the board shall designate such craft as a unit appropriate for the purpose of collective bargaining.*"

The procedures prescribed for the two boards for investigation, certification, and hearing on representation units and for their election are substantially the same except that the State law adds the following limitation not found in the Federal Act: ". . . provided, however, that the board shall not have authority to investigate any question or controversy between individuals or groups within the same labor organization or between labor organizations affiliated with the same parent labor organization." Laws of New York, 1937, Chap. 433, as amended, Laws 1942, Chap. 518, 30 McKinney's Consolidated Laws of New York, § 705.3.

The two boards have at times pursued inconsistent policies in applying their respective Acts to petitions of foremen as a class to organize bargaining units thereunder. The State Board has in these cases recognized that right; the National Board for a time recognized it. *Union Collieries Coal Co.*, 41 N. L. R. B. 961; *Godchaux Sugars, Inc.*, 44 N. L. R. B. 874. Later, there was a period

when, for policy reasons but without renouncing jurisdiction, it refused to approve foremen organization units. *Maryland Drydock Co.*, 49 N. L. R. B. 733; *Boeing Aircraft Co.*, 51 N. L. R. B. 67; *General Motors Corp.*, 51 N. L. R. B. 457. Now, again, it supports their right to unionize. *Packard Motor Car Co.*, 61 N. L. R. B. 4, 64 N. L. R. B. 1212; *L. A. Young Spring & Wire Corp.*, 65 N. L. R. B. 298. The foremen of these appellants, at a time when their desire to organize was frustrated by the policy of the National Board, filed applications with the State Board. It entertained their petitions and its policy permitted them as a class to become a bargaining unit. Both employers, by different methods adequate under State law to raise the question, challenged the constitutionality of the State Act as so applied to them. Their contentions ultimately were considered and rejected by the New York Court of Appeals and its decisions sustaining state power over the matter were brought here by appeals.

Both of these labor controversies arose in manufacturing plants located in New York where the companies employ large staffs of foremen to supervise a much larger force of labor. But both concerns have such a relation to interstate commerce that, for the reasons stated in *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1, federal power reaches their labor relations. On this basis the National Board has exercised power to certify bargaining agents for units of employees other than foremen of both companies. Matter of *Allegheny Ludlum Steel Corporation and Steel Workers Organizing Committee*, Case No. III–R–411, N. L. R. B., June 29, 1942; Matter of *Bethlehem Steel Corp.* and *C. I. O.*, 30 N. L. R. B. 1006, 32 N. L. R. B. 264; 1941 (production and maintenance employees); Matter of *Bethlehem Steel Corp.* and *A. F. of L.*, 47 N. L. R. B. 1330, 1943 (plant protection employees); Matter of *Bethlehem*

Steel Corporation and *C. I. O.*, 52 N. L. R. B. 1217, 1943 (employees in order department); Matter of *Bethlehem Steel Co.* and *A. F. of L.*, 55 N. L. R. B. 658, 1944 (fire department employees). The companies contend that the National Board's jurisdiction over their labor relations is exclusive of state power; the State contends on the contrary that while federal power over the subject is paramount, it is not exclusive and in such a case as we have here, until the federal power is actually exercised as to the particular employees, State power may be exercised.

At the time the courts of the State of New York were considering this issue, the question whether the Federal Act would authorize or permit unionization of foremen was in controversy and was unsettled until our decision in *Packard Motor Car Co.* v. *N. L. R. B.*, — U. S. —. Whatever constitutional issue may have been presented by earlier phases of the evolution of the federal policy in relation to that of the State, the question now is whether, Congress having undertaken to deal with the relationship between these companies and their foremen, the State is prevented from doing so. Congress has not seen fit to lay down even the most general of guides to construction of the Act, as it sometimes does, by saying that its regulation either shall or shall not exclude state action. *Cf.* Securities Act of 1933, § 18, 48 Stat. 85, 15 U. S. C. § 77r; Securities Exchange Act of 1934, § 28, 48 Stat. 903, 15 U. S. C. § 78bb; United States Warehouse Act, § 29, before and after 1931 amendment, 39 Stat. 490, 46 Stat. 1465, 7 U. S. C. § 269. Our question is primarily one of the construction to be put on the Federal Act. It long has been the rule that exclusion of state action may be implied from the nature of the legislation and the subject matter although express declaration of such result is wanting. *Napier* v. *Atlantic Coast Line R. Co.*, 272 U. S. 605.

In determining whether exclusion of state power will or will not be implied, we well may consider the respective relation of federal and state power to the general subject matter as illustrated by the case in hand. These companies are authorized to do business in New York State, they operate large manufacturing plants in that state, they draw their labor supply from its residents, and the impact of industrial strife in their plants is immediately felt by state police, welfare and other departments. Their labor relations are primarily of interest to the state, are within its competence legally and practically to regulate, and until recently were left entirely to state control. Thus, the subject matter is not so "intimately blended and intertwined with responsibilities of the national government" that its nature alone raises an inference of exclusion. *Cf. Hines* v. *Davidowitz*, 312 U. S. 52, 66.

Indeed, the subject matter is one reachable, and one which Congress has reached, under the federal commerce power, not because it is interstate commerce but because under the doctrine given classic expression in the *Shreveport* case, Congress can reach admittedly local and intrastate activities "having such a close and substantial relation to interstate traffic that the control is essential or appropriate to the security of that traffic, to the efficiency of the interstate service, and to the maintenance of conditions under which interstate commerce may be conducted upon fair terms and without molestation or hindrance." *Houston & Texas Ry.* v. *United States*, 234 U. S. 342, 351. See also *National Labor Relations Board* v. *Fainblatt*, 306 U. S. 601.

In the National Labor Relations Act, Congress has sought to reach some aspects of the employer-employee relation out of which such interferences arise. It has dealt with the subject or relationship but partially, and has left outside of the scope of its delegation other closely related matters. Where it leaves the employer-employee

relation free of regulation in some aspects, it implies that in such matters federal policy is indifferent, and since it is indifferent to what the individual of his own volition may do we can only assume it to be equally indifferent to what he may do under the compulsion of the state. Such was the situation in *Allen-Bradley Local* v. *Board*, 315 U. S. 740, where we held that employee and union conduct over which no direct or delegated federal power was exerted by the National Labor Relations Act is left open to regulation by the state. However, the power of the state may not so deal with matters left to its control as to stand "as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hill* v. *Florida*, 325 U. S. 538, 542. *Cf. Maurer* v. *Hamilton*, 309 U. S. 598. When Congress has outlined its policy in rather general and inclusive terms and delegated determination of their specific application to an administrative tribunal, the mere fact of delegation of power to deal with the general matter, without agency action, might preclude any state action if it is clear that Congress has intended no regulation except its own. *Oregon-Washington Co.* v. *Washington*, 270 U. S. 87. In other cases, Congress has passed statutes which initiate regulation of certain activities, but where effective regulation must wait upon the issuance of rules by an administrative body. In the interval before those rules are established, this Court has usually held that the police power of the state may be exercised. *Northwestern Bell Telephone Co.* v. *Nebraska State Commission*, 297, U. S. 471; *Welch Co.* v. *New Hampshire*, 306 U. S. 79. But when federal administration has made comprehensive regulations effectively governing the subject matter of the statute, the Court has said that a state regulation in the field of the statute is invalid even though that particular phase of the subject has not been taken up by the federal agency. *Napier* v. *Atlantic Coast Line R. Co.*, 272 U. S. 605. How-

ever, when federal administrative regulation has been slight under a statute which potentially allows minute and multidudinous regulation of its subject, *cf. Atlantic Coast Line R. Co. v. Georgia*, 234 U. S. 280, or even where extensive regulations have been made, if the measure in question relates to what may be considered a separable or distinct segment of the matter covered by the federal statute and the federal agency has not acted on that segment, the case will be treated in a manner similar to cases in which the effectiveness of federal supervision awaits federal administrative regulation, *Northwestern Bell Telephone Co.* v. *Nebraska State Commission, supra; Welch Co.* v. *New Hampshire, supra.* The states are in those cases permitted to use their police power in the interval. *Terminal Railroad Ass'n* v. *Brotherhood of Railroad Trainmen*, 318 U. S. 1. However, the conclusion must be otherwise where failure of the federal officials affirmatively to exercise their full authority takes on the character of a ruling that no such regulation is appropriate or approved pursuant to the policy of the statute. *Napier* v. *Atlantic Coast Line*, 272 U. S. 605; compare *Oregon-Washington Co.* v. *Washington*, 270 U. S. 87, with *Parker* v. *Brown*, 317 U. S. 341; *cf. Mintz* v. *Baldwin*, 289 U. S. 346.

It is clear that the failure of the National Labor Relations Board to entertain foremen's petitions was of the latter class. There was no administrative concession that the nature of these appellants' business put their employees beyond reach of federal authority. The Board several times entertained similar proceedings by other employees whose right rested on the same words of Congress. Neither did the National Board ever deny its own jurisdiction over petitions because they were by foremen. *Soss Manufacturing Co.*, 56 N. L. R. B. 348. It made clear that its refusal to designate foremen's bargaining units was a determination and an exercise of its discretion to determine that such units were not appropriate for bar-

gaining purposes. *Maryland Drydock Co.*, 49 N. L. R. B. 733. We cannot, therefore, deal with this as a case where federal power has been delegated but lies dormant and unexercised.

Comparison of the State and Federal statutes will show that both governments have laid hold of the same relationship for regulation, and it involves the same employers and the same employees. Each has delegated to an administrative authority a wide discretion in applying this plan of regulation to specific cases, and they are governed by somewhat different standards. Thus, if both laws are upheld, two administrative bodies are asserting a discretionary control over the same subject matter, conducting hearings, supervising elections and determining appropriate units for bargaining in the same plant. They might come out with the same determination, or they might come out with conflicting ones as they have in the past. *Cf. Matter of Creamery Package Mfg. Co.*, 34 N. L. R. B. 108; Wisc. Emp. Rel. Bd. Case III, No. 348 E–117. But the power to decide a matter can hardly be made dependent on the way it is decided. As said by Mr. Justice Holmes for the Court, "When Congress has taken the particular subject-matter in hand coincidence is as ineffective as opposition . . ." *Charleston R. Co. v. Varnville Co.*, 237 U. S. 597, 604. See also *Southern Railway Co.* v. *Railroad Commission of Indiana*, 236 U. S. 439, 448; *Missouri Pacific R. R.* v. *Porter*, 273 U. S. 341, 345–6. If the two boards attempt to exercise a concurrent jurisdiction to decide the appropriate unit of representation, action by one necessarily denies the discretion of the other. The second to act either must follow the first, which would make its action useless and vain, or depart from it, which would produce a mischievous conflict. The State argues for a rule that would enable it to act until the federal board had acted in the same case. But we do not think

that a case by case test of federal supremacy is permissible here. The federal board has jurisdiction of the industry in which these particular employers are engaged and has asserted control of their labor relations in general. It asserts, and rightfully so, under our decision in the *Packard* case, *supra*, its power to decide whether these foremen may constitute themselves a bargaining unit. We do not believe this leaves room for the operation of the state authority asserted.

The National and State Boards have made a commendable effort to avoid conflict in this overlapping state of the statutes. We find nothing in their negotiations, however, which affects either the construction of the federal statute or the question of constitutional power insofar as they are involved in this case, since the National Board made no concession or delegation of power to deal with this subject. The election of the National Board to decline jurisdiction in certain types of cases, for budgetary or other reasons presents a different problem which we do not now decide.

We therefore conclude that it is beyond the power of New York State to apply its policy to these appellants as attempted herein. The judgments appealed from are reversed and the causes remanded for further proceedings not inconsistent herewith.

Reversed.

SUPREME COURT OF THE UNITED STATES

Nos. 55 AND 76.—OCTOBER TERM, 1946.

Bethlehem Steel Company, et al., Appellants, v. New York State Labor Relations Board.	Appeal from the Court of Appeals of the State of New York.
The Allegheny Ludlum Steel Corp., Appellant, v. William J. Kelley and H. Myron Lewis, Constituting the State Labor Relations Board of the State of New York.	Appeal from the Supreme Court of the State of New York for the County of Chautauqua.

[April 7, 1947.]

Separate opinion of MR. JUSTICE FRANKFURTER, in which MR. JUSTICE MURPHY and MR. JUSTICE RUTLEDGE join.

The legal issue in these cases derives from our decision in *Packard Motor Car Co. v. National Labor Relations Board*, No. 658, this Term, decided March 10, 1947. The Court there held that foremen are "employees" within § 2 (3) of the National Labor Relations Act, 49 Stat. 449, 450, and as such are entitled to the rights of self-organization under the Act. As the *Packard* case points out, the exercise of this authority over foremen has had a chequered history before the National Labor Relations Board. There was a period when the Board in the exercise of its discretion denied resort to its authority by foremen seeking collective bargaining representation. During that period, foremen of the two petitioning steel companies invoked the jurisdiction of the New York State Labor Board to certify

them as a bargaining unit under the New York law descriptively characterized as a "Little Wagner Act" because it enforces the same policies by the same means as does the Wagner Act. The State Board assumed jurisdiction and the New York Court of Appeals sustained that assumption. Our problem is whether the National Labor Relations Act in its entirety—the law as Congress gave it to the National Board for administration—precluded this exercise of State authority.

If the Court merely held that, having given the National Board jurisdiction over foremen Congress also gave it discretion to determine that it may be undesirable, as a matter of industrial relations, to compel recognition of foremen's unions; that the Board had so exercised its discretion and, by refusing to sanction foremen's unions, had determined that foremen in enterprises like those before us could not exact union recognition; that therefore New York could not oppose such federal action by a contrary policy of its own, I should concur in the Court's decision, whatever the differences of interpretation to which the course of events before the National Board may lend itself. But the Court's opinion does not, as I read it, have that restricted scope, based on the individual circumstances before us. Apart from the suggestion that the National Board's declination of jurisdiction "in certain types of cases, for budgetary reasons" might leave room for the State in those situations, the Court's opinion carries at least overtones of meaning that, regardless of the consent of the National Board, New York is excluded from enforcing rights of collective bargaining in all industries within its borders as to which Congress has granted opportunity to invoke the authority of the National Board.

The inability of the National Board to exercise its dormant powers because of lack of funds ought not to furnish a more persuasive reason for finding that concurrent State power may function than a deliberate exercise of

judgment by the National Board that industrial relations having both national and state concern can most effectively be promoted by an appropriate division of administrative resources between the National and the State Boards. This states abstractly a very practical situation. Based on the realization that as a practical matter the National Board could not effectuate the policies of the Act committed to it over the whole range of its authority, an arrangement was worked out whereby the National Board leaves to the State Board jurisdiction over so-called local industries covered by the federal Act, while the State Board does not entertain matters over which the National Board has consistently taken jurisdiction. This practical Federal-State working arrangement, arrived at by those carrying the responsibility for breathing life into the bare bones of legislation, is so relevant to the solution of the legal issues arising out of State-Nation industrial interaction, that I have set forth the agreement in full into Appendix. Particularly when dealing with legal aspects of industrial relations is it important for courts not to isolate legal issues from their workaday context. I cannot join the Court's opinion because I read it to mean that it is beyond the power of the National Board to agree with State agencies enforcing laws like the Wagner Act to divide, with due regard to local interests, the domain over which Congress had given the National Board abstract discretion but which, practically, cannot be covered by it alone. If such cooperative agreements between State and National Boards are barred because the power which Congress has granted to the National Board ousted or superseded State authority, I am unable to see how State authority can revive because Congress has seen fit to put the Board on short rations.

Since we are dealing with aspects of commerce between the States that are not legally outside State action by virtue of the Commerce Clause itself, New York

has authority to act so long as Congress has not interdicted her action. While what the State does she does on sufferance, in ascertaining whether Congress has allowed State action we are not to consider the matter as though Congress were conferring a mere bounty, the extent of which must be viewed with a thrifty eye. When construing federal legislation that deals with matters that also lie within the authority, because within the proper interests, of the States, we must be mindful that we are part of the delicate process of adjusting the interacting areas of National and State authority over commerce. The inevitable extension of federal authority over economic enterprise has absorbed the authority that was previously left to the States. But in legislating, Congress is not indulging in doctrinaire, hard-and-fast curtailment of the State powers reflecting special State interests. Federal legislation of this character must be construed with due regard to accommodation between the assertions of new federal authority and the functions of the individual States, as reflecting the historic and persistent concerns of our dual system of government. Since Congress can, if it chooses, entirely displace the States to the full extent of the far-reaching Commerce Clause, Congress needs no help from generous judicial implications to achieve the supersession of State authority. To construe federal legislation so as not needlessly to forbid preexisting State authority is to respect our federal system. Any indulgence in construction should be in favor of the States, because Congress can speak with drastic clarity whenever it chooses to assure full federal authority, completely displacing the States.

This is an old problem and the considerations involved in its solution are commonplace. But results not always harmonious have from time to time been drawn from the same precepts. In law also the emphasis makes the song. It may make a decisive difference what view judges have of the place of the States in our national life when they

come to apply the governing principle that for an Act of Congress completely to displace a State law "the repugnance or conflict should be direct and positive, so that the two acts could not be reconciled or consistently stand together." *Sinnot* v. *Davenport*, 22 How. 227, 243. Congress can speak so unequivocally as to leave no doubt. But real controversies arise only when Congress has left the matter in doubt, and then the result depends on whether we require that actual conflict between State and federal action be shown, or whether argumentative conflict suffices.

Our general problem was only recently canvassed in the three opinions in *Hill* v. *Florida*, 325 U. S. 538. But the frequent recurrence of the problem and the respective legislative and judicial share in its proper solution justify some repetition. It may be helpful to recall the circumspection with which federal absorption of authority previously belonging to the States was observed in the control of railroad rates.

In the *Minnesota Rate Cases*, 230 U. S. 352, this Court, after elaborate argument and extended consideration, held that State rates covering intrastate transportation could not be stricken down judicially even though it may be shown that such rates adversely affect carriers in their interstate aspects. This decision was based largely on the respect to be accorded to the respective functions of State and national authority, as evinced by Congressional and judicial history. But a year later, the Court held that when the Interstate Commerce Commission found that State regulation of local rates was designed to operate discriminatorily against related interstate commerce, the Interstate Commerce Act authorized removal of the discrimination against the interstate rates. *Houston, East and West R. Co.* v. *United States*, 234 U. S. 342. Nevertheless, so important did this Court deem respect for State power that it would not allow the *Shreveport* doctrine to

be loosely used as a curtailment of State authority. Accordingly, it insisted on precision and definiteness in the orders of the Interstate Commerce Commission in this interacting area. *Illinois Central R. Co.* v. *State Public Utilities Commission*, 245 U. S. 493. Subsequently, by the Transportation Act of 1920, Congress formalized the *Shreveport* doctrine and extended its scope. The Commission was expressly authorized to correct State rates that were unreasonable with reference to related interstate rates, and was also given control over State rates which adversely affected interstate commerce as such. See § 13, par. 4 of the Interstate Commerce Act, as amended by §§ 416 and 422 of the Transportation Act of 1920, 41 Stat. 456, 484, 488; *Wisconsin Railroad Commission* v. *C. B. & Q. R. R. Co.*, 257 U. S. 563; *New York* v. *United States*, 257 U. S. 591. It is not without significance that in exercising this new power Congress associated with the Interstate Commerce Commission the appropriate State agencies in an advisory capacity. Even where foreign commerce is involved, as to which State control is naturally viewed with less favor, this Court has not ruled out State authority derived from a State interest where State regulation was found to be complementary to federal regulation. *Union Brokerage Co.* v. *Jensen*, 322 U. S. 202, 208–09.

No doubt, as indicated, cases have not always dealt with such scrupulous regard for State action where Congress has not patently terminated it. Metaphor—"occupied the field"—has at times done service for close analysis. But the rules of accommodation that have been most consistently professed as well as the dominant current of decisions make for and not against the *modus vivendi* achieved by the two agencies in the labor relations field, which the Government, as *amicus curiae*, here sponsored. Such an arrangement assures the effectuation of the policies which underlie both the National Labor Relations Act and the "Little Wagner Act" of New York in a manner agreed

upon by the two Boards for dealing with matters affecting interests of common concern. "Where the Government has provided for collaboration the Court should not find conflict." *Union Brokerage Co.* v. *Jensen*, 322 U. S. 202, 209.

What is before us is a very real and practical situation. The vast range of jurisdiction which the National Labor Relations Act has conferred upon the Board raises problems of administration wholly apart from available funds. As a result of this Court's decision in *National Labor Relations Board* v. *Fainblatt*, 306 U. S. 601, untold small enterprises are subject to the power of the Board. While labor difficulties in these units in the aggregate may unquestionably have serious repercussions upon interstate commerce, in their individualized aspects they are equally the concern of their respective localities. Accordingly, the National Labor Relations Board, instead of viewing the attempt of State agencies to enforce the principles of collective bargaining as an encroachment upon national authority, regards the aid of the State agencies as an effective means of accomplishing a common end. Of course, as Mr. Justice Holmes said, "When Congress has taken a particular subject matter in hand coincidence is as ineffective as opposition" to save the State law. But this is so only when the State seeks "to enforce a state policy differently conceived. . . ." *Charleston & Western Carolina R. R. Co.* v. *Varnville Furniture Company*, 237 U. S. 597, 604.

The National Board's business explains the reason and supports the reasonableness behind its desire to share burdens that may be the State's concern no less than the Nation's. The Board's Annual Reports show increasing arrears. At the end of the fiscal year 1944, 2602 cases were pending; at the end of 1945, 3244; at the end of 1946, there were 4605 unfinished cases. A shrewd critic has thus expressed the considerations that in the past have often

lain below the surface of merely doctrinal applications: "Formally, the enterprise is one of interpretation of the Act of Congress to discover its scope. Actually it is often the enterprise of reaching a judgment whether the situation is so adequately handled by national prescription that the impediment of further state requirements is to be deemed a bane rather than a blessing." T. R. Powell, *Commerce Clause* and *State Police Power*, 12 Minn. L. Rev. 607. In the submission by the Board before us, we have the most authoritative manifestation by national authority that State collaboration would be a blessing rather than a bane, and yet judicial construction would forbid the aid which the agency of Congress seeks in carrying out its duty. It is surely a responsible inference that the result will be to leave uncontrolled large areas of industrial conflict. Neither what Congress has said in the National Labor Relations Act, nor the structure of the Act, nor its policy, nor its actual operation, should be found to prohibit the Board from exercising its discretion so as to enlist the aid of agencies charged with like duties within the States in enforcing a common policy by a distribution of cases appropriate to respective State and National interests.

APPENDIX.

Documents Indicating Understanding Between the New York and the National Labor Relations Boards.

NEW YORK STATE LABOR RELATIONS BOARD
250 West 57th Street
NEW YORK 19

WILLIAM E. GRADY, Jr.
General Counsel

JULY 10, 1945.

ALVIN J. ROCKWELL, Esquire
General Counsel,
National Labor Relations Board,
Washington, D. C.

DEAR MR. ROCKWELL: The Board has examined your memorandum of our conference of April 20, 1945 and considers that it represents a fair statement of the proceedings.

As to insurance companies (page 6 of your memo), you will recall that we mentioned our prior experience with such companies and the fact that units of less than statewide scope have been established and upheld by the courts. In such cases, therefore, we think it would be to the benefit of both Boards that you clear with us. A situation may very easily arise in which you would prefer to have us entertain a petition which had been filed with us.

Best regards.
Sincerely,

s/ WILLIAM E. GRADY, Jr.

NATIONAL LABOR RELATIONS BOARD,
Washington 25, D. C., July 26, 1945.

WILLIAM E. GRADY, Jr.,
General Counsel,
New York State Labor Relations Board,
250 West 57th Street,
New York City 19, N. Y.

DEAR MR. GRADY: In Mr. Rockwell's absence on vacation this week, I am replying to your letter of July 10.

Mr. Rockwell's memorandum of our conference of April 20 and your letter were discussed with and approved by the Members of the Board.

We are, accordingly, circulating copies of this memorandum to the members of our staffs in the Buffalo and New York City offices. This memorandum and your letter will hereafter be followed as a guide in relations between the two Boards as regards cases arising in New York State.

Sincerely yours,

s/ Oscar S. Smith
OSCAR S. SMITH,
Director of Field Division.

MEMORANDUM RE CONFERENCE BETWEEN REPRESENTATIVES OF NEW YORK STATE LABOR RELATIONS BOARD AND NATIONAL LABOR RELATIONS BOARD, HELD FRIDAY, APRIL 20, 1945.

A conference was held at the offices of the New York State Labor Relations Board on Friday, April 20, 1945, attended by Father Kelley, Chairman, and Board Members Goldberg and Lorenz, Executive Secretary Goldberg, General Counsel Grady, and Associate General Counsel Feldblum, of the New York State Labor Relations Board, and by Field Director Smith, New York Regional Director

Howard LeBaron, General Counsel Rockwell, and New York Regional Attorney Perl, of the National Labor Relations Board. The subject of the conference was the proper division of jurisdiction between the National and State Boards.

This conference followed an earlier conference held on January 9, 1945, in Washington, between Messrs. Smith and Rockwell and Buffalo Regional Director Ryder, representing the NLRB, and Messrs. Goldberg and Feldblum, representing the New York Board. At the conference in Washington, the principal subject discussed was the action of the State Board in entertaining election petitions involving the employees of large interstate manufacturing establishments over which the National Board has customarily asserted jurisdiction. The cases in question related to petitions filed by labor organizations which sought to be certified as representatives of units of supervisory employees or, in one case, a labor organization which sought to represent non-supervisory employees but whose membership was composed of a substantial number of supervisors. At the time of the January conference, the Board's decision in the *Packard* case, 61 N. L. R. B., No. 3, had not been issued; it appeared that in certifying a labor organization for supervisory employees the State Board was taking action contrary to that which would have been taken by the National Board had the petition been filed with it. It was also believed that the action of the State Board in proceeding to a certification of a labor organization for non-supervisory employees whose membership included supervisors in substantial number might be contrary to the National Board's disposition of the case under its decision in *Matter of Rochester & Pittsburgh Coal Co.*, 56 N. L. R. B. 1760. No understanding was reached with regard to these types of cases at the January conference. In the meantime, on March 26, 1945, the Board issued its decision in the *Packard* case,

holding that it would proceed to certify unaffiliated unions as representative of supervisory employees and leaving open the question of whether it would proceed to certify affiliated unions as such representatives. The New York conference was arranged in order to discuss the types of cases which were the subject of the January conference and also to canvass in general the question of the respective jurisdictions of the two Boards.

The New York conference began with consideration of Father Boland's letter to Mr. Madden dated July 12, 1937, which has constituted the principal basis of understanding between the two Boards during the ensuing years. The Boland letter states:

> Unless there are unusual circumstances, the New York State Labor Relations Board will assume jurisdiction over all cases arising in the following trades and industries, without clearing, except as a matter of record, with the National Board's officials:
>
> 1. Retail stores,
> 2. Small industries which receive all or practically all raw materials from within the State of New York, and do not ship any material proportion of their product outside the State,
> 3. Service trades (such as laundries),
> 4. Office and residential buildings,
> 5. Small and clearly local public utilities (this includes local traction companies, as well as gas and electric light corporations),
> 6. Storage warehouses,
> 7. Construction operations,
> 8. Other obviously local businesses.

A copy of the letter of July 12, 1937, is attached to this memorandum.

At the time of the preparation of the letter of July 12 and the conference which preceded it and upon which it is based, there was relatively little case law as to the

jurisdiction under the commerce clause of the National Board under the National Act. Since that time there has been a large number of decisions in the federal circuit courts of appeals and several in the Supreme Court which have substantially extended the Board's jurisdiction beyond that which was understood to exist in July 1937. To take only one pertinent example: In July 1937 the Board had not asserted jurisdiction over retail establishments. Since 1937 the Board has accepted a considerable number of cases involving retail establishments such as department stores and the Board's power in this respect has been sustained by the courts. Notwithstanding this extension of jurisdiction under the National Act, the National and State Boards, respectively, have, in general, followed the understanding reflected by the letter of July 12, 1937. Thus, in New York State the National Board has not asserted jurisdiction over retail establishments. The representatives at the conference of April 20 expressed the view that, by and large, the understanding had worked out well as applied to the types of businesses there dealt with. The position was repeatedly expressed by the representatives of both National and State Boards that as a working matter the jurisdiction between the two Boards must be allotted on the basis of the type of industry or business involved (rather, for example, than on the basis of which Board a petition or charge is initially filed with), and that when one Board, pursuant to common understanding, has asserted jurisdiction in the past over a particular employer, the other Board should thereafter refer any matters coming to it to the Board which had entertained the earlier case or cases.[1]

Following reference to the letter of July 12, there was detailed discussion of the eight categories there listed, which are quoted above. The gist of this discussion was

[1] In *Consolidated Edison Co.* v. *N. L. R. B.*, 305 U. S. 197, 223, the Supreme Court indicated that in deciding whether or not to assert jurisdiction the National Board could properly take into account

as follows: *Retail stores.* Where the same company operates retail stores and also does a substantial interstate mail order business from within New York State, representatives of the National Board pointed out that probably the National Act should be applied to the company. The understanding was reached that before the State Board asserted jurisdiction in the future over any such companies, the case would be cleared with the National Board through the New York City or Buffalo offices, depending upon the region in which the case arose. *Service trades.* Where a New York concern is in the business of furnishing guards, window washers, laundry, or some other type of service within the State, it was felt that the business is essentially local in character and should be subject to the State Act even though the services are furnished to a number of large interstate enterprises, which in themselves are subject to the jurisdiction of the National Act. (An exception is the case of detective agencies doing business on a national scale, concerning which, it is understood, the State Board will clear with the National Board before asserting jurisdiction.) On the other hand, where the interstate enterprise, over which the National Board would customarily assert jurisdiction, supplies its own guard, window washing, laundry, or other service for itself, it was believed that the employees involved would rightly come within the jurisdiction of the National Act. The test here is whether the service is performed by a separate business establishment which can properly be considered a local enterprise even

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the existence of State protective legislation, such as the New York State Labor Relations Act.

The National Act contains no provision authorizing the National Board to enter into compacts or agreements with State Boards, but would seem to require the National Board in each case to exercise its discretion whether or not to proceed. It is believed, nevertheless, that understandings such as that embodied in the letter of July 12, 1937, although of no legal effect, assist both Boards in determining the proper disposition of particular cases as they arise.

though services are rendered to interstate businesses, or whether the service is rendered by the interstate enterprise itself as an incident of its own business. *Office buildings.* The same test applicable to the service trades was also thought to be applicable to office buildings. Thus, if the employer involved is in the business of operating office buildings he is subject to the State Act even though tenants consist of interstate enterprises. On the other hand, where the office building is owned or operated, or both, by an interstate enterprise, over which the National Board would customarily assert jurisdiction, and is used by the interstate enterprise in conducting its interstate business, the National Board would expect to assert jurisdiction. *Public utilities.* It was agreed that the New York Board could properly assert jurisdiction over such utilities, including electric, gas, traction, bus companies, and the like which are not themselves engaged in supplying service across the State line. In short, where the National Board could only base its jurisdiction on the "affecting commerce" principle (plus the shipment into the State of fuel and capital equipment, not for resale), it was believed in general that the National Board could properly leave jurisdiction to the State Board. An exception to this working rule is provided by a few very large utilities, such as the Consolidated Edison Company, over which the National Board originally asserted jurisdiction. *Warehouses.* The test applied in the case of service trades and office buildings seems applicable to warehouses, the question being whether they are operated as separate local enterprises or as incidents of the operation of interstate business over which the National Board would customarily take jurisdiction. *Construction business.* The New York Board is expected to assert jurisdiction over the construction industry except, for example, in the case of the construction of ships, which is thought of as falling within the field of manufacturing, over which, in general, the National Board asserts jurisdiction.

In addition to the foregoing lines of activity, referred to in the letter of July 12, 1937, two other businesses not dealt with in that letter were also discussed. *Insurance companies.* In the past both the State and the National Boards have intermittently asserted jurisdiction over insurance companies. So far as small insurance, bonding, casualty companies, etc., doing business primarily within the State are concerned, it was felt that the State Board should occupy this field. So far as the large national companies are concerned, however, the representatives of the National Board expressed the view that hereafter cases involving such companies should be handled by the latter Board. In this connection it was pointed out that as organization has matured among the large companies, State-wide and even larger units are being established and that this type of activity had therefore advanced to the stage where it was peculiarly the interest of the National Board. It was agreed that the State Board would not entertain any cases involving the large national companies without prior clearance with the National Board. *Newspapers.* The National Board has taken jurisdiction over large daily newspapers in New York and other States and, where challenged, has been uniformly sustained in this by the courts. At the same time, the circulation departments of such newspapers, to the extent that the distributing activity is confined within a single State, are in many aspects local in character. In New York State, and particularly in New York City, where news vendors are subject to local licensing requirements, the National Board feels that cases involving the distribution of newspapers should properly be handled by the State Board. Consistent with this approach, the New York Regional Office of the National Board has recently referred to the State Board news vendor cases involving four of the largest afternoon newspapers in New York City. The representatives of the State Board expressed agreement with this approach and indicated that the proper line of division might come at the level of the circulation managers.

It was agreed that hereafter neither Board will accept cases at the circulation manager level without prior clearance with the other Board; that cases above this level will be handled by the National Board; and that cases below this level will be handled by the State Board. Of course, small newspapers of limited circulation will properly be handled by the State Board.

Concurrent jurisdiction.[2] The letter of July 12, 1937, left open the question of "concurrent jurisdiction"—by which, it is understood, was meant the procedure to be followed in the case of employers who might simultaneously be subject to the requirements of both the State and National Acts. The letter stated: "So far as concurrent jurisdiction is concerned, we assume that even a tentative understanding must await mutual study of the memorandum which Mr. Fahy is now preparing." It appears that the memorandum referred to was never prepared and that no subsequent understanding was reached as to such concurrent jurisdiction. In practice, this does not seem to have been a problem, except in the situation discussed below, since the State Board has by and large confined its activities to the businesses detailed in the letter of July 12 and the National Board in turn has left this field open to the State Board. The problem of so-called "concurrent jurisdiction" has arisen in recent months because, following the National Board's decision in *Matter of Maryland Drydock Company*, 49 N. L. R. B. 733, a number of labor organizations have filed election petitions with the State Board which they knew would not be entertained by the National Board. (See the second paragraph of this memorandum above, concerning the conference of January 9, 1945, in Washington.) Prior to the *Maryland Drydock* case, the State Board, it is understood, had refrained from entertaining cases involving large interstate manufacturers and the National

[2] See *Davega-City Radio, Inc.* v. *New York Labor Relations Board*, 281 N. Y. 13; 22 N. E. 2d 145; 4 L. R. R. Man. 899. (July 11, 1939.)

Board had asserted exclusive jurisdiction over such employers.

At the conference of April 20 the representatives of the National Board pointed to the recent decision in the *Packard* case and suggested that the State Board should adhere to its general policy of leaving all cases involving large manufacturing establishments doing interstate business to the National Board. The impracticability of both Boards intermittently asserting jurisdiction over the same employer was emphasized, and in addition the question was raised whether under the Federal Constitution the State Board could lawfully enforce any requirement against such employers which was inconsistent with or which imposed restraints in addition to those enforced by the National Board. The representatives of the New York Board agreed that cases of this type presented a legal problem but were of the view that it was advisable for the State Board to entertain election petitions for units of supervisory employees where it was doubtful whether the National Board would proceed with the case were it filed with the latter Board. The representatives of the New York Board pointed to their obligation to contribute to the maintenance of industrial peace within the borders of New York State and recalled a provision of the New York Constitution which guarantees organizational rights to all employees. The representatives of the latter Board agreed however, that their officials should not reach out for cases of this character, involving large interstate manufacturers, and that they would keep the National Board advised as to all such cases they decided to entertain. Thus, no broad understanding was reached on this score, both Boards reserving their respective positions with regard to petitions for units of supervisory employees and other petitions involving large interstate manufacturers.

It was believed that it would be helpful to the work of both Boards if lists of cases entertained within the

State were periodically exchanged. The details of this were left to be worked out.

NEW YORK STATE LABOR RELATIONS BOARD,
July 12, 1937.

Honorable J. WARREN MADDEN,
National Labor Relations Board,
Washington, D. C.

DEAR MR. MADDEN: We wish, in the first place, to thank you and your colleagues for your warm reception of last Wednesday. It is gratifying to know that we can look forward to such wholehearted cooperation from your Board and its staff. We will gladly reciprocate.

As requested, we outline our recollection of the understandings reached. So far as concurrent jurisdiction is concerned, we assume that even a tentative understanding must await mutual study of the memorandum which Mr. Fahy is now preparing.

Unless there are unusual circumstances, the New York State Labor Relations Board will assume jurisdiction over all cases arising in the following trades and industries, without clearing, except as a matter of record, with the National Board's officials:

1. Retail stores,
2. Small industries which receive all or practically all raw materials from within the State of New York, and do not ship any material proportion of their product outside the State,
3. Service trades (such as laundries),
4. Office and residential buildings,
5. Small and clearly local public utilities (this includes local traction companies, as well as gas and electric light corporations),
6. Storage warehouses,
7. Construction operations,
8. Other obviously local businesses.

Clearance is certainly going to be required in the case of industries where the raw materials or most of them come from without the State, but the product is not shipped beyond the borders of New York. (The question here is as to the breadth of application of the "come to rest" doctrine of the *Schechter* case.)

You are familiar, of course, with Section 715 of our statute, part of which reads as follows: "Application of article. The provisions of this article shall not apply to the employees of any employer who concedes to and agrees with the board that such employees are subject to and protected by the provisions of the national labor relations act or the federal railway labor act . . .". The New York State Board will undoubtedly take the position that the words "agrees with" contemplate the necessity of our Board's agreeing with the employer that his employees are subject to the national statute and that no employer can by unilateral action select his jurisdiction.

This however, does not solve all of the problems created by the Section, since it is clear that even the agreement of this Board with the employer will not necessarily bestow federal jurisdiction under the Constitution. Presumably every time such a concession is proffered by an employer, our Board will have to clear with the National Board officials in the same way it would clear with them if no such concession were made.

It is our understanding that we should clear on all questions of jurisdiction with the Regional Directors in New York City and Buffalo in the first instance, and that you will instruct your Directors to reciprocate by clearing with us all doubtful cases which first come to their attention.

Whenever this Board and either of your Regional Directors find themselves unable to agree, the matter will be taken up with you at once.

We would appreciate knowing that your recollection and understanding of the above are in accord with our own.

Very sincerely your,

s/ John P. Boland

(Dr.) JOHN P. BOLAND, *Chairman.*

NATIONAL LABOR RELATIONS BOARD.

MINUTES OF AUGUST 16, 1946.

An informal inquiry was made to the Board by United Financial Employees Association asking whether the Board would entertain a Section 9 representation petition on behalf of the employees of Harris Upham and Company, a New York brokerage house. The Board was also advised that similar petitions were contemplated for the employees of a number of similar New York brokerage houses. The Board concluded that it would not, at this time, entertain a petition filed on behalf of the employees of Harris Upham and Company or other such brokerage houses because of budgetary and other administrative considerations. The Board further concluded that, in view of this disposition, it had no objection to having the State Labor Relations Board of the State of New York entertain such petitions filed under the State Act.

Dated at Washington, D. C.
August 16, 1946.

Donn N. Bent
DONN N. BENT,
Executive Secretary.

Approved:
s/ P. M. H.
s/ J. M. H.

Certified to be a true and correct copy.

s/ Donn N. Bent
DONN N. BENT,
Executive Secretary.